To the Right Honourable the Lords Spiritual and Temporal in Parliament assembled:

Introduction.

1. This is the Petition of Graham Nassau Gordon Senior-Milne (formerly Milne), Baron of Mordington, of 39 Castle Street, Norham, Northumberland TD15 2LQ*, formerly of Edrington House, Mordington, Berwickshire TD15 1UF, who claims to possess the Barony and Regality of Mordington in the Peerage of Scotland, and shows as follows.

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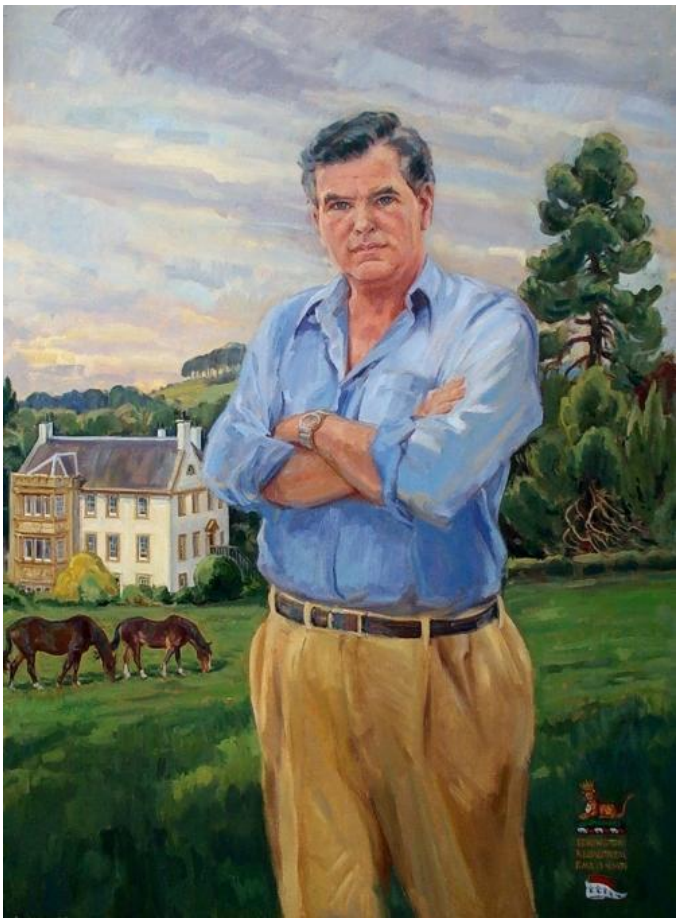


   The petitioner, Graham Nassau Gordon Senior-Milne, Baron of Mordington, with Edrington House (2004); the manor house of Nether Mordington, described as such in various charters under the Great Seal (e.g. 13/9/1636, C2/55/2, no. 245; 2/8/1662, C2/60/1, no. 192). The smallest palace in the United Kingdom (see para. 95).

2. That I wish to recall, firstly, for the benefit of members of the Committee for Privileges, and others, who are not familiar with peerage matters, certain comments in the *'Complete Peerage'* (2nd Edition), the most authoritative work on the British peerage, concerning the Earldom of Mar peerage claim of 1867, as follows:

- *'To this day the House of Lords does not know the truth about the Resolution which it passed on 26 February 1875. That Resolution falsified history, and it is a subject with which the Complete Peerage must deal.'* (*'Complete Peerage'*, Vol. IX, p. 77).
- The decision to denude the rightful claimant of his title and estates was *'a verdict, which appears flagrantly unjust, and founded upon perversions of the facts and miscontructions of the ancient law of the country.'* (*'Complete Peerage'*, Vol. VIII, p. 854).
- *'But the most remarkable feature of the Case is that the question, which of the Contestants had right to the Earldom of Mar, a question which engaged the House of Lords for eight years, and for another ten was the subject of bitter controversy, could have been settled in half an hour.'* (*'Complete Peerage'*, Vol. IX, p. 77).
- Reference is made to *'the unjust refutations and hinderances made by obstinate and partial rulers and officers, refusing reasonable prayers and petitions...'* (*'Complete Peerage'*, Vol. IX, Appendix. J, p. 162). This refers to the exclusion of the rightful heirs between 1457 and 1565 when Mary, Queen of Scots, restored the Earldom to the rightful heir.
- *'The Committee of* [sic] *Privileges, in their Report, unfortunately came to an erroneous conclusion, founded upon no facts whatever. Had that Committee taken the opinion of those versed in Scotch Law they might have avoided certain errors into which they had fallen.'* (Lord Mansfield, House of Lords, 9/7/1877, http://hansard.millbanksystems.com/lords/1877/jul/09/resolution).

3. That, as with the present claim, the Earldom of Mar claim concerned a feudal barony (an earldom) which, in essence, the Committee for Privileges refused to acknowledge for eighteen years and, in fact, never acknowledged, merely adopting the ruse of recognizing two non-existent peerages instead. The first, a restitution of the feudal/territorial earldom by Mary*, Queen of Scots, in 1565, was treated as a new creation in tail male by a presumed patent (of which there was no evidence whatsoever); the second, to give recompense to the rightful heir to the feudal/territorial earldom, who had been wrongfully denuded of his titles and estates by the erroneous treatment of the 1565 restitution, was an erroneous restitution of a grant, of the liferent only, of the feudal/territorial earldom of Mar in 1404 by Isabel Douglas (c1360-1408), Countess of Mar, to her second husband, Alexander Stewart (c1375-1435). Thus, two non-existent earldoms were recognized, one of which (the one of 1404) went to the rightful heir and possessor of the feudal/territorial earldom. Thus, the present Countess of Mar of the 1404 'creation' is, in fact, a feudal countess, given that the Earldom of Mar Restitution Act 1885 restored *'the honours, dignities, and titles of peerage anciently belonging to or enjoyed and held with the territorial earldom of Mar…'*. This is, in effect, a recognition of a feudal/territorial earldom, given that it recognizes that the peerage 'belongs to' (is parcel with) the feudal/territorial earldom (they were and are, in fact, one and the same thing). Bear in mind that the ancient peerage can only have been of the feudal/territorial kind. Note the **statutory recognition** of a territorial earldom and of the peerage belonging to (actually the same as) that earldom.

   *This was clearly a confirmation of an existing right to a feudal earldom conveyed in recognition of that right, with the standard feudal terminology appropriate to the conveyance of feudal subjects, to the rightful heir, John Erskine, as confirmed in Parliament in 1567 (*The Records of the Parliaments of Scotland to 1707*, K.M. Brown et al eds (St Andrews, 2007-2018), 1567/4/7. Date accessed: 28 November 2018):

'Ratification of the earldom of Mar and castle of Stirling and others etc.

On the which day our sovereign lady, understanding that of before, upon perfect knowledge had by her highness by certification of evidents and by other ways, that one noble and mighty lord John [Erskine], earl of Mar, lord Erskine etc., was lawfully descended of the ancient heritors of the said earldom and had the doom of undoubted heritable right thereof and of the regality of Garioch, our said sovereign, upon that consideration and for the good and thankful service done by him and his predecessors to her highness and her grace's predecessors, conveyed, after her majesty's lawful age of 21 years complete, to the said earl, his heirs and assignees the foresaid earldom of Mar and regality of Garioch, property and tenantry, feu mails and pertinents thereof, by infeftment made to him under her great seal thereupon; and also our said sovereign, understanding that after her lawful age foresaid, for the good service done to her majesty and her predecessors by the said earl and for other reasonable causes moving her highness, heritably conveyed to him and his male male bearing the surname and arms of Erskine the heritable captaincy of the castle of Stirling and keeping of the park thereof, with the offices of sheriffship of the sheriffdom of Stirling and bailiary and chamberlainry of the lordship thereof; and similarly that our said sovereign had made the said earl and his heirs her highness's chamberlains of certain of her lands in Menteith, and giving him the mails thereof in recompense of the trumpeter's fees out of Garioch and Kintyre for so long as they shall have the same; and also have granted to him the feu mails of the lordship of Brechin and Navar, as our said sovereign's infeftments under the great seal and gifts under the privy seal made to the said earl and his heirs contained therein of the said earldom, offices, feu mails and others above-written in themselves respectively at more length purport; therefore, our said sovereign, now willing that the infeftments and gifts made to the said earl, his heirs and assignees specified therein of the foresaid earldom, regality, offices and feu mails respectively be sufficient and sure to him and them in time coming, has now, with the advice and consent of the three estates of this realm in this present parliament, ratified, approved and confirmed and, by the tenor hereof, ratifies, approves and confirms the said infeftments and gifts and each one of them respectively in all and sundry points, passes, privileges, clauses and conditions contained therein; and wills and ordains that the said earl, his heirs and assignees shall possess and enjoy the said earldom, property and tenantry with the feu mails and duties thereof, and feu mails of the said lands in Menteith, and of the lordship of Brechin and Navar, with all commodities and pertinents perpetually in time coming, after the form and tenor of the infeftments and gifts respectively made to him thereupon, without any revocation, contradiction or impediment to be made to him, his heirs and assignees therein in any way in time coming, renouncing, disclaiming and discharging for our said sovereign and her successors all action her highness had, has or may pursue against him or them thereupon forever by this act. And further, our said sovereign and three estates of parliament foresaid have interposed and interpose their authority thereto, to be extended in the most ample form with the extension of all clauses needful, and that letters be directed to make publication hereof, if need be, in the appropriate form.'

4. That the notorious decision of the House of Lords in the Earldom of Sutherland claim of 1771 was, if possible, even more nonsensical than its decision in the Earldom of Mar claim of 1867, because the House ruled that not one of the Crown Charters in the entire history of the earldom was effective in conveying the Earldom, but only conveyed the estates; a flagrant perversion of both history and the law (See John Riddell, *'Inquiry into the Law and Practice in Scottish Peerages'*, Edinburgh, 1842, Vol. I, p. 597, where he refers to this as a *'preposterous and futile doctrine'*). However, since the House treated the Earldom as descendible to heirs general, the Earldom, fortuitously, ended up in the right hands; those of the only surviving daughter of the last Earl, Elizabeth Sutherland (1765-1839), the famous Duchess Countess of Sutherland. Interestingly, the current Duke of Sutherland, Francis Ronald Egerton (b. 1940), is a

3rd cousin of the petitioner through their common ancestors, the petitioner's great-great-grandparents, Hugh Hammersley (1819-1882) and his wife, Dulcibella Hammersley (née Eden), a cousin of Sir Anthony Eden (1897-1977), 1st Earl of Avon, Prime Minister (1955-1957).

5. That almost every decision of the House of Lords/Committee for Privileges involving feudal titles has been nonsensical, including those relating to Arundel (1433), as a precedent,* Abergavenny (1604), Fitzwalter (1670) and Berkeley (1861). That these decisions were not soundly based in law (but were solidly based in prejudice) is proved by certain comments made by Lord Redesdale himself in the Berkeley case, who stated (VIII, HLC, 153), with reference to the Abergavenny case, that *'the manner in which both peerages* [Abergavenny and Le Despencer] *were awarded by restitution is a proof that the House was resolved not to declare Abergavenny a barony by tenure'*. In other words, the House of Lords simply refused to recognize a feudal barony (barony by tenure), regardless of the law, and that was that. The *'Complete Peerage'* describes the decisions of the Committee for Privileges as *'arbitrary, conflicting and unhistoric'* (Vol. I, p. xiii). This was said in relation to baronies by writ (which are an invention with no basis in law or history), but it applies equally to its decisions concerning baronies by tenure.

   In the original Arundel case of 1433 a feudal earldom was recognized, quite correctly, but, in the Berkeley case of 1861, the Committee for Privileges refused to acknowledge this as a precedent ('Complete Peerage'*, Vol. I, p. 231, n. b). But it is very easy to prove the existence of feudal earldoms, as, for instance, via the *'Complete Peerage'* (Vol. IV, *'Earldoms and baronies in history and in law, and the doctrine of abeyance'*, p. 675) which states:

   'In 1200 King John confirmed an agreement between William de Vernon, Earl of Devon, and Hubert de Burgh, wherein it is stated:

   *"uod idem comes assignavit filie sue priori natu capud honores sui in Devon cum castello de Plinton cum esnescya et cum rationabili parte que eam contingit de hereditate sua"***

   This deed had no effect because an heir was born to William shortly before its execution but had the Earl died without male issue the settlement of the castle of Plympton on the elder daughter ***must have carried the Earldom with it*** [my emphasis].'

   "that (or because or since) the said earl (has) assigned, to his elder daughter, the seat of his honour in Devon, with the castle of Plinton, with the 'esnescya'* and with a reasonable part which bordered (or was connected with) it [i.e. the 'esnescya'] (out) of his heritage"

   ***'esnescya' - *'that integral part of the tenure which carried with it, according to the nature of the fief, either the right to the name of earl or the right or duty of representing all the service due from the barony of a baron'* (*'The Complete Peerage'*, Vol. IV, p. 676). *'Jus esneciae'* ('the law of impartible inheritance'), the law that honours (including the Crown), being seats of authority, justice and defence, cannot be broken up because this would result in the disintegration of the kingdom. Part of this is *'droit d'ainesse'* ('the right of the first-born' - to inherit the impartible elements of an inheritance), which includes to the right of an elder daughter, in the absence of a male heir, to inherit the impartible elements of an honour, being the capital messuage (castle or manor house) or seat (*'caput'*) of the honour, the title (name of earl or baron) and the various duties, rights and privileges, including the jurisdiction, and the undifferenced arms. Queen Elizabeth II inherited the Crown undivided under this law, there being some idea in 1930 that the Queen and her sister would be joint heiresses (UK National Archives File HO 45/23509). Thus, the Crown itself is treated as a feudal barony. England has perhaps never had a *caput* in the proper sense - but Scotland certainly did (until 2004); this was the Moot Hill at Scone, where the Kings of Scots were crowned in ancient times. Ownership of the *caput* carried the kingdom with it.

Where the 'right to the name of earl' is attached to a physical place, we are clearly dealing with an earldom by tenure, since it is the tenure (the holding of the property) which carries the earldom with it.

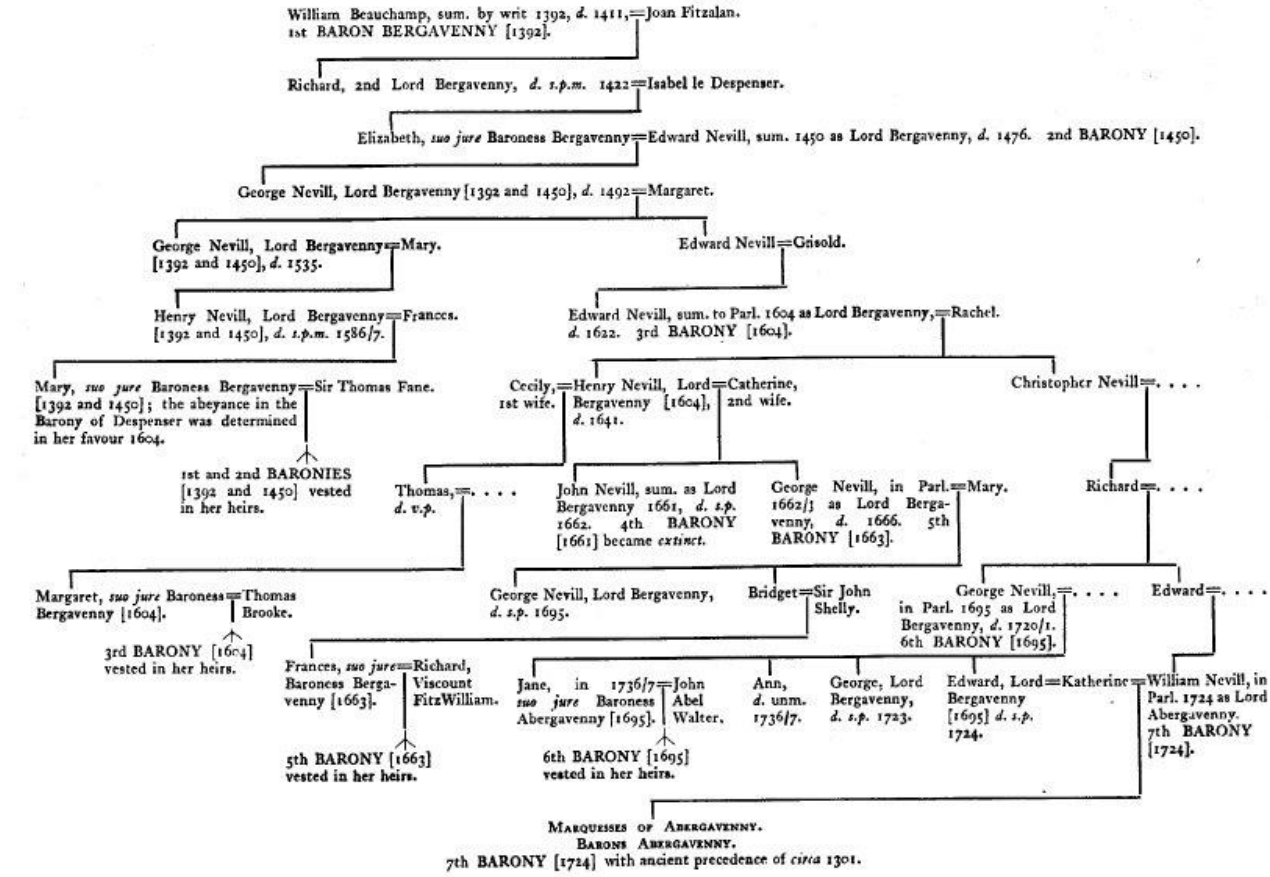
MS illustration depicting the coronation of King Alexander III of Scotland (1241-1286) on the Moot Hill, Scone. He is being greeted by the *ollamh rígh*, the royal poet, who is addressing him with the proclamation "Benach De Re Albanne" (*Beannachd Dé Rígh Alban*, "God Bless the King of Scotland"); the poet goes on to recite Alexander's genealogy (Folio 206, Corpus Christi College, Cambridge MS).

6. That in both the Mar case and the Abergavenny case, the House of Lords preferred to 'recognize' (in fact, invent) non-existent peerages rather than recognize actual (and very historic) feudal baronies. Clearly, it only did this because it knew that it should have recognized those feudal baronies as peerages. In this context, my ancestral uncle, Ascanius William Senior (1728-1789), High Sheriff of Hampshire, brother of my ancestor, Nassau Thomas Senior (d. 1786), married Charlotte Walter (1736-1811, memorial in Bath Abbey), daughter of John Abel Walter (d. 1767) and Jane Nevill (d. 1786), *de jure* 4th Baroness Bergavenny of the 6th creation, being the eventual heir general (on the death of her brother Edward, who dsp in 1724) of her father, George Nevill (d. 1720/1), Baron of Bergavenny and Premier Baron in the peerage of England at that time. A writ of summons was wrongly issued in 1724 to Jane Nevill's first cousin, William Neville (d. 1744), father of George Nevill (1727-1785), 1st Earl of Abergavenny and ancestor of the current Marquess of Abergavenny (*'Complete Peerage'*, Vol. VI, p. 711), on the patently false assumption (according to the doctrine of baronies by writ) that the barony should pass to the heir male rather than the heir general. The *'Complete* Peerage', Vol. VI, p. 711 specifically states that the Barony of Bergavenny (6th creation) vested in the heirs of John Abel Walter and Jane Nevill (see below). Charlotte Walter was the sole heir of her brother, John Walter (1733-1811), according to *'Genealogies of Barbados Families'* (p. 580), which also quotes his will, meaning that she would, on this basis, have inherited the Barony of Bergavenny, if only briefly, on his death. The Barony would then have passed to Charlotte's heirs. Thus, the Senior

family has already felt the effects of these distortions of peerage law. See also Joseph Foster, *'The Royal Lineage of our Noble and Gentle Families'*, Hazell, Watson and Viney, London, 1883, p. 15.

Complete Peerage, Vol. VI, p. 711

Chart showing creation of no less than seven Baronies of Bergavenny or Abergavenny according to modern doctrine as to Barony by Writ.



7. That I hope times have changed. They certainly have changed to the extent that the Committee for Privileges is no longer the final arbiter in such matters and an application (in effect, appeal) now lies to the European Court of Human Rights, given that peerages are property and that the rights attached to them are rights of property which fall within the scope of Article 1 of Protocol 1 of the European Convention on Human Rights.

   - Note that in Mereworth v Ministry of Justice [2011] EWHC 1589 (Ch) it was said at 22 that *'the decision of the European Court of Human Rights in De la Cierva Osorio de Moscoso and Others v Spain, ECHR 1999-VII, decided in terms that a nobiliary title cannot be regarded as amounting to a possession.'* This statement is incorrect.

   - What the ECtHR actually said was that the **<u>expectation</u>** of a title did not amount to a 'possession'*. The court did not address the question of whether a title which is already in possession amounts to a 'possession', since this was not an issue before it. In other words, this case is not a precedent in relation to either Scottish or English non-feudal peerages (peerages created by writ or letters patent) or feudal baronies/regalities, whether peerages or not.

     **'The Court reiterates that under its case-law the Article relied upon does no more than enshrine the right of everyone to the peaceful enjoyment of "his" possessions.*

*Consequently**, it applies only to a person's existing possessions*** [my emphasis] *and does not guarantee the right to acquire possessions whether on intestacy or through voluntary dispositions (see, mutatis mutandis, the Marckx v. Belgium judgment of 13 June 1979, Series A no. 31, p. 23, § 50; and the Van der Mussele v. Belgium judgment of 23 November 1983, Series A no. 70, p. 23, § 48).*

*Furthermore, **while a legitimate expectation of acquiring property may in certain instances be equated to a "possession" within the meaning of paragraph 1 of Article 1, such an expectation is always dependent on the commitment of a third party*** [my emphasis]*; that is the case, for example, with the granting of a commercial operating licence by the authorities (see the Pine Valley Developments Ltd and Others v. Ireland judgment of 29 November 1991, Series A no. 222, p. 23, § 51; and the Tre Traktörer AB v. Sweden judgment of 7 July 1989, Series A no. 159, p. 22, § 55).*

The Court considers that a nobiliary title cannot, as such, be regarded as amounting to a "possession" within the meaning of that provision. [my emphasis] *In general, the same applies to a mere hope of being able to exploit such a title commercially, for example, as a trademark. **Since in the instant case the applicants are unable to assert the right to use the nobiliary titles concerned, a fortiori, they cannot claim any legitimate expectation concerning the commercial exploitation of those titles.*** [my emphasis] *In these circumstances and in accordance with Article 35 § 3 of the Convention, the Court considers that the applicants' complaints under Article 1 of Protocol No. 1 taken alone and under Article 14 of the Convention taken together with Article 1 of Protocol No. 1 must be dismissed as being incompatible ratione materiae with those provisions.'*

Sébastien van Drooghenbroeck, Doctor of Laws, in his *'The concept of "possessions" within the meaning of Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms'* (The European Legal Forum, 7-2000/01, pp. 438-9) states: *'Whatever the essential subject of protection may be, Article 1 of Protocol No. 1 does not limit itself to protection of property in the most classic sense of the term, but extends it to other interests, provided that they demonstrate a certain number of characteristics which have been progressively developed in the jurisprudence. First of all, these interests must be of a "hereditable" or "commercial" nature (III). Secondly, these interests, without necessarily being totally "current" or up to date, must show a sufficient likelihood of being realised and thus represent the "legitimate expectations" of their holder (III). Finally, these legal interests must manifest themselves in a sufficiently identifiable manner (IV).'* […] *'The common denominator of the "possessions" listed thus far is their "hereditable nature" or likewise the "commercial value" of the interests which they represent. In contrast, any interest not displaying this characteristic would be precluded from the scope of applicability of Article 1 of Protocol No. 1. Thus, for instance, the ECHR, in its decision dated 28 October 1999 against Spain, considered that an inherited noble title could not be considered a "possession", in particular because of lack of any "hereditable nature".'*

This is, of course, nonsense; with a few notable exceptions, such as knighthoods and life peerages, titles of nobility are hereditable (that is, heritable or *'capable of being inherited'* (https://www.collinsdictionary.com/dictionary/english/heritable, accessed 21/10/2017)), either because they 'enoble the blood', and the quality of nobility is therefore passed on to the grantee's heir or heirs by blood, or because they confer nobility on the holder, as with feudal baronies, and that quality passes to any successor, including, in the case of feudal baronies, an assignee - so this passage confirms that titles, when heritable, are 'possessions' under Article 1 of Protocol 1, rather than the opposite.

Further, the statement *'an inherited noble title could not be considered a "possession", in particular because of lack of any "hereditable nature"'* is contradictory. How can an inherited title not be hereditable (hereditable means the same as heritable)? This is just nonsense.

- R.P. Gadd, in his *'Peerage* Law' (ISCA Publishing, 1985, p. 14), confirms that peerages are real property and cites various cases, including the Buckhurst Peerage Claim [1876] 2 App Cas 1 HL and Earl Cowley v Countess Cowley [1901] App Cas 450. In addition, feudal baronies can be sold and so clearly are similar, in terms of their nature as property, to other intangible property such as patents. No-one would argue that a patent is not property. In addition, Article 20 of the Union with Scotland Act 1706 protects heritable jurisdictions (and feudal baronies and regalities are heritable jurisdictions) as 'rights of property'. Thus, any right to sit and vote in Parliament parcel with a feudal barony is a 'right of property' by statute, because it was the baronial jurisdiction over land held immediately of the King, which gave the baron the right and duty to attend the King's Court (or Parliament as it became). The jurisdiction and the right to attend Parliament were impartible.
- Note also that under s.2 Human Rights Act 1998, a court or tribunal must take into account the decisions of the ECtHR, amongst other things, in determining any question that arises in connection with a convention right. This would include any right attached to or parcel with a feudal barony, such as a right to sit and vote in the House of Lords. John Riddell, in his '*Inquiry into the Law and Practice in Scottish Peerages'* (Thomas Clark, Edinburgh, 1842, Vol. I, p. x) says: *'as late as 1835, Lord Brougham* [Lord Chancellor 1830-1834]*, in the Polwarth claim, forcibly impressed that, "we", the Committee for Privileges, "are sitting in a Scottish court, as a Court of Appeal"* […]*.'* The House of Lords, in its capacity as a court hearing a peerage claim, meets the criteria laid down in Case C-54/96 Dorsch Consult [1997] ECR I-4961, ECJ, where it was said: *'In order to determine whether a body making a reference is a 'court or tribunal'* [...] *the Court takes into account a number of factors, such as: whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law, and whether it is independent.'*
- In Alconbury [2001] UKHL 23; [2001] 2 All ER 929 it was said at 26 (my emphasis): *'Your Lordships have been referred to many decisions of the European Court of Human Rights on article 6 of the Convention. Although the Human Rights Act 1998 does not provide that a national court is bound by these decisions it is obliged to take account of them so far as they are relevant. In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights. If it does not do so there is at least a possibility that the case will go to that court which is likely in the ordinary case to follow its own constant jurisprudence.'*
- See also Krombach (Judgments Convention/Enforcement of judgments) [2000] EUECJ C-7/98 (http://www.bailii.org/eu/cases/EUECJ/2000/C798.html) at 27: *'Article F(2) of the Treaty on European Union (now, after amendment, Article 6(2) EU) embodies that case-law. It provides: 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.'*
- *Article 6 TEU (came into effect on 1/12/2009) states: '1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European*

Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.'

- **Thus, the Committee for Privileges must take into account (in effect, apply) the decisions of the ECtHR and its decisions are reviewable by the ECtHR.**

8. That I am concerned about the handling of my petition because I have met with consistent obstruction, obfuscation and worse* from officials with whom I have I have dealt so far in relation to this petition, including Ian Denyer, Registrar of the Peerage, who has now departed it seems, and Mrs. Elizabeth Roads, Lyon Clerk and Keeper of the Records. I regret having to disclose this conduct but there is no good reason why I should put up with it.

*For instance, in an E-Mail to me dated 13/8/2009, Ian Denyer wrote that the Earldom of Sutherland is *'included on the Roll on the basis that the present Countess of Sutherland held a Writ of Summons to Parliament prior to the passing of the House of Lords Act 1999.*'This assertion, which was also made by Mrs. Elizabeth Roads, Lyon Clerk and Keeper of the Records, in an E-Mail to me dated 1/7/2016, was an attempt to persuade me that the Earldom was not included on the Roll as a feudal barony but as a barony by writ. This assertion is nonsense. The entry on the Roll for Sutherland says: *'Hereditary Countess in the Peerage of Scotland'*. Since there have been no peerages of Scotland created since 1707 and since there have never been any 'baronies by writ' in Scotland, where the concept of baronies by writ is unknown to law, a peerage of Scotland must date from before 1707 and cannot be a barony by writ. Further, in the case of Sutherland, the title can only be a feudal barony because there has never been a grant of a personal title of that name (Earl of Sutherland) by letters patent. In addition, no earldom has ever been <u>created</u>, either in England or Scotland, by writ of summons (though a husband has received a writ of summons *jure uxoris* (in right of his wife by the 'courtesy of England') in relation to an <u>existing</u> earldom held by his wife). Further, in her E-Mail of 1/7/2016, Mrs. Roads also asserted that the Dukedom of Rothesay [sic] is on the Roll because it is a 'royal dignity', but this is another plainly nonsensical assertion; peerages are included because they meet the definition of a peerage as given in the royal warrant of 1/6/2004, which has nothing to do with whether a dignity is 'royal', but which says:

'9. Interpretation: "Peer"

(1) For the purposes of this Our Warrant "Peer" means a Peer of:
- *(a) England,*
- *(b) Scotland,*
- *(c) Ireland,*
- *(d) Great Britain,*
- *(e) the United Kingdom of Great Britain and Ireland,*
- *(f) the United Kingdom of Great Britain and Northern Ireland.*

(2) Paragraph (1) extends to all such Peers, irrespective of:
- *(a) the degree of their Peerage;*
- *(b) whether their Peerage was created by Letters Patent or otherwise;*
- *(c) whether their Peerage is hereditary or is for life.*

(3) "Peerage" is to be read accordingly.'

In 2002, when I had only just started to research the matter, Mrs. Roads informed a professional researcher working on my behalf (Dr. J. A. Robertson) that *'Further, you* [Graham Senior-Milne] *only possess a small fraction of the lands of Nether Mordington, and* ***<u>there is the general acceptance that the baron possesses the greater part of the lands</u>*** [my emphasis]*, so that any claim to be baron of Nether Mordington in the absence of possession of the greater part of the lands would not be considered. Mrs. Roads considers that you have no case* [to claim possession of the barony].' (E-Mail to me from Dr. J. A. Robertson dated 30/3/2002). And yet, in

an article published in 2001, just a few months earlier (Roads, Elizabeth, *'Heraldry and Scotland's Landed Families'*, *'Burke's Landed Gentry - The Kingdom of Scotland'*, 19th Ed., 2001, p. xvi), Mrs. Roads wrote: *'Many of those who have more recently acquired a feudal barony in Scotland have begun to take a very active interest in the communities around the lands comprising their feudal barony. In many cases* ***the lands which now comprise the caput of the feudal barony have become very small indeed*** [my emphasis] *and the individual does not therefore own a great degree of heritage in Scotland.'* Thus Mrs. Roads made two completely contradictory statements in the space of a few months. The truth of the matter is (as is well-known) that a baron only needs to own the *caput* itself, which could be a small building or small patch of land or even no land at all, the baron merely holding the feudal superiority of the *caput*. Mrs. Roads must have herself been involved, as Lyon Clerk, in a number of grants of arms with baronial additaments based on ownership of a small parcel of land in each case, since this was the method most commonly adopted by landowners to sell a feudal barony in their possession (they sold the entire lands of the barony but reserved from the sale all the lands except a small patch of land, or perhaps a cottage, designated as the *caput*).*

*This was done because the only 100% certain way to convey a barony was to use the words *'the lands and barony of x'* in a disposition, though it is well known that a conveyance of the entire lands of a barony will carry the barony *sub silentio*, as will a conveyance of the *caput* alone (the *caput* and the barony being impartible) unless an intention to reserve the barony (necessarily with some other place designated as the *caput*) is made clear. Having conveyed the whole lands and barony, everything apart from the designated *caput* was then reserved out of the sale. The key thing was that the Lord Lyon wanted to see a conveyance of *'the lands and barony of x*; this was the 'safe method' since these are the normal words used in a charter of erection. I have seen a number of examples of this approach, including the Barony of Prestongrange (grant of arms in 1999), where the caput was designated as *'the dominium directum* [superiority] *of the three storey tenement Two hundred and Forty-two High Street, Prestonpans'*. Since Mrs. Roads was appointed to the position of Lyon Clerk in 1986, she would have been involved in the related grant of arms in 1999, so she was fully aware, at that time, that the *caput* of a barony could consist of a small building or a small parcel of land. Professor Croft Dickinson, in his introduction to *'The Court Book of the Barony of Carnwath 1523-1542'*, states (p. xxi): *'Again, in August 1475, Archibald, Earl of Angus, and the lord of the barony of Cluny, sold the lands of the barony of Cluny to David Crichton of Cranston, excepting from the sale, however,* ***'one merk land of the said lands for his chief messuage, with the superiority of the said barony'*** [my emphasis]*; and in the September immediately following, Archibald, Earl of Angus, and still lord of the barony of Cluny, resigned into the King's hands his lands and barony of Cluny.'*

9. That, in this context, I note the statement in Mereworth v Ministry of Justice [2011] EWHC 1589 (Ch) (http://www.bailii.org/ew/cases/EWHC/Ch/2011/1589.html) at 12:

'What applies to the House of Commons applies equally to the House of Lords. This is illustrated by Viscountess Rhondda's claim [1922] 2 AC 339 where the House of Lords' Committee for Privileges considered the claim of Viscountess Rhondda to sit in the House of Lords. Her claim was based on the Sex Disqualification (Removal) Act 1919. Lord Birkenhead, the Lord Chancellor, said that it was the duty of the Committee to report into the question whether Viscountess Rhondda was entitled to receive a Writ of Summons. As he put it:

> ***"The writ is not to be issued capriciously or withheld capriciously at the pleasure of the Sovereign or of this House. It is to be issued, or withheld, according to the law relating to the matter, and if, under that law, it appears that there is a debt of justice to the petitioner in that matter, the writ will issue and, if not, it cannot issue."*** [my emphasis]

Thus, the decision in that case about whether the law required a writ to be issued was a matter for the Committee for Privileges to decide. Lord Birkenhead also referred to the earlier decision of the Committee for Privileges in the Wensleydale Peerage Case [1856]. This was the case in which Sir James Parke, the distinguished judge of the Court of the Exchequer, was created a Life Peer but the House of Lords refused to allow him to sit and vote in the House because, they decided, that as the law then stood, the creation of Life Peers was not within the Crown's prerogative powers. It was in consequence of that that the law was changed by Act of Parliament to allow creation of Life Peers as the first Law Lords. The validity of the original creation was decided by the Committee for Privileges because it was a question of entitlement to sit and vote in the House.

Lord Lyndhurst, who spoke for the majority of the Committee, explained the procedure in column 1156 of the full text of the debate in the Committee for Privileges (which does not appear in the Law Reports themselves). What Lord Lyndhurst said was this:

> *"If a Writ of Summons is improperly withheld, your Lordships can insist upon its being issued. You may address the Crown for that purpose if you think proper. If that address to the Crown is unavailing, there is a remedy that in a remarkable case has been resorted to and which was effectual to attain its object. The Peers in Parliament, in that case, refused to proceed to business until the Writ of Summons was issued and until the House was properly constituted, and the historian who records this fact says that the means adopted were so effectual that the King was induced to issue the Writ of Summons and that the abuse of which they complained never occurred again. That is a remedy when the Writ of Summons is withheld. On the other hand, when a party has obtruded himself upon the House in which he has no right to sit, the remedy is equally plain. It is your duty to direct your Officers to refuse to administer the oaths, or allow the party to take his seat."*

Lord Lyndhurst also asserted, in clear terms, the right of the Committee to decide who was entitled to receive the Writ of Summons and, as indicated, he said that if a person is entitled to a writ, but the Crown does not issue one, then his remedy is to petition the House. [my emphasis] *That is the advice that the Crown Office gave Lord Mereworth in the present case and, in my judgment, that advice was correct. If the Committee for Privileges has jurisdiction, it seems to me that must be an exclusive jurisdiction to decide upon entitlement to sit and vote in the House, otherwise there would be a risk of conflicting decisions: on the one hand, those of the courts and, on the other, those of the Committee for Privileges which would not be conducive to the separation of powers inherent in our constitution.'*

10. In the same case it was said at 3: *'The response of the Crown Office of the House of Lords was that the result of section 1 of the House of Lords Act 1999 was that Lord Mereworth was not entitled to a Writ of Summons because he was a hereditary peer. Lord Mereworth persisted with his request and by letter of 22 October 2010, the Head of the Crown Office said that: "If you consider that the Crown Office has withheld a writ of summons which you are entitled to receive, then, given that this is a matter relating to the membership of the House of Lords, you should contact the Chairman of the Committee for Privileges and Conduct, House of Lords, London SW1A OPW."'*

11. That while in the past it appears that the Committee for Privileges did not consider itself bound by its own (or the House of Lords') previous decisions (as shown by its refusal to recognize the Arundel case as a precedent in the Berkeley claim of 1861), these words state clearly that the Committee for Privileges has now accepted (certainly since 1922) that it is bound by the law in the normal way, including that relating to precedent. This means that the Committee is bound to apply the same rules relating to precedent as the Supreme Court (given that the Committee was really the Appellate Committee with another hat on).

12. That in spite of the conduct of officials towards me so far and in spite of the sorry history of peerage claims based on the possession of a feudal title, I expect my petition to be dealt with in accordance with the law, which I set out below as best I can. I do this on the basis that, for my petition to succeed, relevant matters of both fact and law must be proved, which is why I present the relevant legal arguments below as part of this petition. Note that Palmer's *'Peerage Law in England'* (Stevens & Sons Ltd, London, 1907, p. 231) states: *'The petition may, as regards questions of law arising on the facts, state that the petitioner is advised to this or that effect.'* Clearly, where the petitioner is representing himself, or is himself an expert, he may state his views as to the law. In any event, I trust that the ridiculous reasoning in the Fitzwater case (1670) will be avoided; namely *'the nature of a barony by tenure being discoursed, it was found to have been discontinued for many ages, and not in being, and so not fit to be revived'*. The ridiculous nature of the idea that barony by tenure can be lost by the mere passage of time is proved by the abolition of tenure by military service in the Tenures Abolition Act 1660, because it was clearly necessary to pass an Act of Parliament (The Tenures Abolition Act itself) to extinguish tenure by military service, even though the last proper military summons in England took place in 1327, some 333 years earlier. In short, the fact that tenure by military service had fallen into disuse over 300 years earlier had not affected its legal existence one jot.

13. That Lord Halsbury, in the Earldom of Norfolk Peerage Claim [1907] AC 10 HL, said: *'Our duty is to the best of our ability to ascertain what the law is, and, having ascertained it, to give effect to it; to alter it or even modify it is the function of the Legislature, and not of your Lordships' House. No stronger illustration of this principle can be given than when, so lately as 1818, the Court of King's Bench, with Lord Ellenborough presiding, felt itself compelled to allow a claim to wager of battle [trial by combat] in an appeal of murder, and but for the intervention of an Act of Parliament (59 Geo. III, c.46), some of His Majesty's judges might have had to preside over a single combat between the appellant and his antagonist.'*

14. That Erskine May (*'A Treatise upon the Law, Privileges, Proceedings and Usage of Parliament'*, 1851, Ch. 19, p. 381), the recognized authority on parliamentary procedure and practice, states (and I assume that the current version, the 24th edition, says the same): *'The right of petitioning the Crown and Parliament for redress of grievances is acknowledged as a <u>fundamental principle of the constitution</u>* [my emphasis]*.'* For the avoidance of doubt, a right to petition means a right to have a petition heard and considered, not a right to submit a petition which is then thrown in the waste paper basket by an official without being heard or considered. Clearly, a person has a 'grievance' (basis for a complaint), and can therefore seek redress, if he is the holder of a title but is not recognized as the holder of that title, as would be the case with any owner of any property or any holder of any rights who is not acknowledged as the owner of that property or holder of those rights. As authority for this proposition, Erskine May cites the Bill of Rights 1688 (*'Right to petition - That it is the Right of the Subjects to petition the King and all Commitments and Prosecutions for such Petitioning are Illegall.'* and Magna Carta 1297 (*'No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, <u>we will not deny or defer to any man either Justice or Right</u>* [my emphasis]*.'*). **<u>Clearly, a refusal to consider a petition amounts to denying a person justice, or an opportunity to obtain justice, which is the same thing, so it follows that Parliament is obliged to consider my petition. To do otherwise would be in breach of both Magna Carta and the Bill of Rights and, as such, a denial of justice at the most fundamental level. It would amount to the House of Lords affirming that it is no longer bound by Magna Carta or the Bill of Rights (if it can ignore one fundamental constitutional right, it can ignore them all) and has therefore overthrown the constitution and become no more than a gang of outlaws (literally 'outside the law').</u>**

Jurisdiction and time limits.

15. That Lord Halsbury ('*The Laws of England*', Butterworth & Co., London, 1909, Vol. 9, p. 21) says that *'In peerage cases there are two questions, one of law, that of the nature and existence of the dignity; the other of fact, that of descent to the claimant.'*

16. That, for this reason, it is submitted that the 'nature of the dignity', including the rights and privileges parcel with the dignity, such as rights of admiralty, is within the jurisdiction of the House of Lords. Palmer's *'Peerage Law in England'* (Stevens & Sons Ltd, London, 1907, p. 11) states that the jurisdiction of the House of Lords in peerage matters includes *'from time to time to declare the law generally in regard to peerage law and rights'*. The words 'rights', being plural, necessarily includes rights parcel with a peerage other than the right to sit and vote in the House of Lords.

17. That in Earl Cowley v Countess Cowley [1901] App Cas 450 it was held that, as a peerage matter, a question of whether the divorced wife of an earl could use the title of 'countess' was outside the jurisdiction of the ordinary courts and it follows that any aspect of a peerage, including those not related to the question of a right to sit and vote in the House of Lords, is therefore outside the jurisdiction of the ordinary courts and solely within the jurisdiction of the Committee for Privileges of the House of Lords.

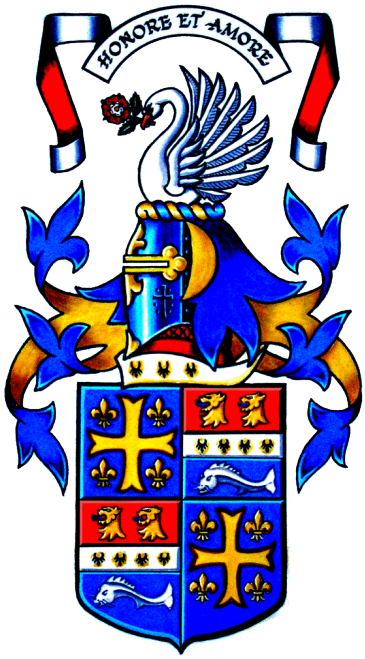
18. Even if certain matters are judged to be outside the jurisdiction of the House of Lords, all rights and privileges which I believe are parcel with the Barony and Regality of Mordington are included here for completeness and to allow the House of Lords to determine what is and what is not properly within its jurisdiction in this case.

19. That Palmer's *'Peerage Law in England'* (Stevens & Sons Ltd, London, 1907, p. 163) states: *'It is well settled that mere delay in claiming a peerage will not bar the right to it.'* Reference is made to Marchant's Reports of the Gardner Case, p. 464.

20. That Lord Halsbury ('*The Laws of England*', Butterworth & Co., London, 1909, Vol. 7, p. 267) says that statutes of limitation do not apply to the Crown, except by express mention or necessary implication, and, by extension, they do not apply to palatine lords or lords of regality (Halsbury also says that this also applies to the Duke of Cornwall and this can only be because Cornwall is a county palatine).

The petitioner is the Baron of Mordington in the peerage of Scotland.

21. That the petitioner was recognized as Baron of Mordington (as a feudal or territorial barony in the baronage of Scotland) by an interlocutor (decree) of the Court of the Lord Lyon dated 11 November 2004, followed by a Grant of Arms, with baronial additaments, under the hand and seal of the Lord Lyon King of Arms dated 30 October 2007.



Arms, with baronial additaments (a chapeau or 'cap of estate' gules, furred ermine, and a great titling helm) granted to Graham Nassau Gordon Senior-Milne, Baron of Mordington in 2007.

22. That the Barony of Mordington is a lordship of regality (palatinate), like other regalities recognized by the Lord Lyon, such as the Lordship and Regality of Garioch, which was recognized on 30/4/2015 (Petition of George David Menking of 21/8/2014).

23. **That there are at least four Scottish feudal baronies currently recorded on the Roll of the Peerage; the Dukedom of Rothesay* (which is also a regality), the Earldom of Mar**, the Earldom of Sutherland*** (which is also a regality), and the Barony of Torphichen****, and that, accordingly, the petitioner, as Baron of Mordington, should also be recorded on the Roll. See also Somerville (*'Complete Peerage'*, Vol. XIIA, p. 100, n. f), Ochiltree (*'Complete Peerage'*, Vol. X, p. 7), Hamilton, Keith, Lorne and Avandale (Stewart of Avandale in the *'Complete Peerage'*) (Alexander Grant, *'The Development of the Scottish Peerage'*, The Scottish Historical Review, Vol. 57, No. 163, Part 1 (Apr., 1978), p. 16), all of which were feudal baronies treated as peerages in the modern sense. Note that in 1723 the House of Lords recognized James Somerville of Drum as Lord Somerville (*'Complete Peerage'*, Vol. XIIA, p. 104) even though there is no evidence of a patent of creation of any personal peerage title and in spite of the fact that the title was undoubtedly treated as a feudal barony as late as 1606, when Gilbert Somerville was omitted from the Decreet of Ranking, having sold his estates (*'Complete Peerage'*, Vol. XIIA, p. 100).**

*'*Complete Peerage*' (2nd Ed., Vol. XI, p. 208, n. b) states that this peerage *'must have been of a feudal or territorial kind'* (see also Vol. III, p.444, n. c). Of course, the Duchy has never ceased to be such and the title inherited by the current Prince of Wales must have been the original title

because it was inherited by operation of the Act of 1469 (which applies to the original title) when the present monarch ascended the throne.

**'*Complete Peerage*', Vol. VIII, p. 397-433; Vol. VIII, p. 827-854; Vol. IX, p. 77-169.

***'*Complete Peerage*', Vol. XII, Part I, p. 546, 548, 549, 553 etc., which all show the nature of the earldom as a feudal title. For the grant of regality see *'Complete Peerage'*, Vol. XII, Part I, p. 555.

****'*Complete Peerage*', Vol. XII, Part I, p. 776.

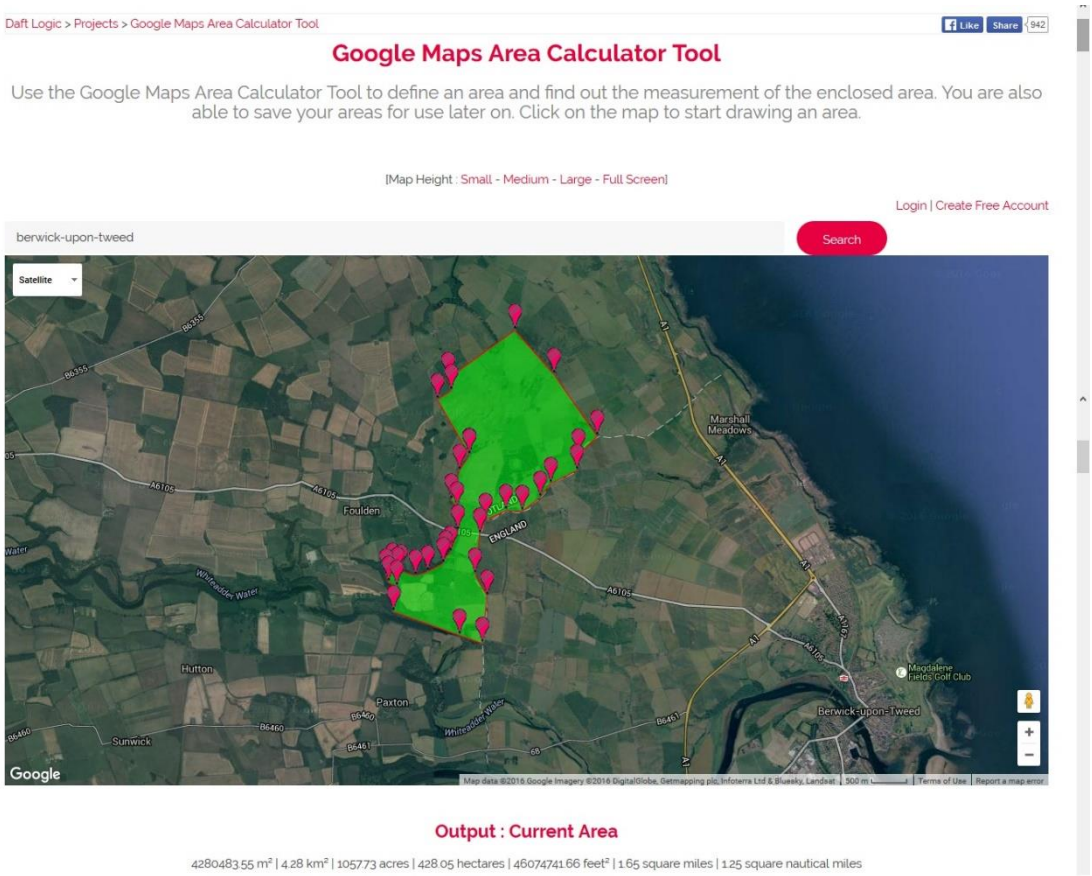
24. That if the present petition is not granted, at least solely on the basis that the petitioner is a feudal baron (and not, for instance, already a Lord of Parliament by virtue of the Act of 1503 - for which see next paragraph), it will be necessary to remove these peerages from the Roll of the Peerage. Note that it was found impossible to remove the ancient Earldom of Mar from the Roll of Peers of Scotland (*'Complete Peerage'*, Vol. IX, Appendix J, p. 167), even though the Committee for Privileges had found that it no longer existed (*'Complete Peerage'*, Vol. IX, Appendix J, p. 166). See http://hansard.millbanksystems.com/lords/1877/jul/09/resolution.

25. That by an Act of the Scottish Parliament of 1503 (c. 78)* all baronies exceeding 100 merklands in extent were accounted greater baronies**; that is, Lordships of Parliament in the modern sense (Stair, *'The Institutions of the Law of Scotland'*, Vol. I, II.3.2) and that, accordingly, the Barony of Mordington, qualifying as such by virtue of being about 1000 acres in extent***, is not a feudal or territorial barony of the smaller kind, but has been recognized as a greater barony and Lordship of Parliament in the modern sense**** under an Act of the Scottish Parliament. *'Reports of the Lords Committees touching the Dignity of a Peer of the Realm'*, ordered to be printed 18/5/1829, Vol. 1, p. 116 says *'the Statute of James the Fourth in 1503 drawing the Line, according to the then Extent, for the future as well as the present.'* In other words, those deemed greater barons in 1503 were so deemed for the future; the statute of 1503 'drew the line' between the greater barons and the smaller barons.

*'*Item, it is statute and ordained, that fra thine foorth na barronne, freehalder, nor vassal quhilk ar within ane hundredth markes of this extent, that now is, be compelled to cum personally to the parliamente, bot gif it be that our soveraine lorde writing specially for them. And sa not to be unlawed for their presence and they send their procuratours to answere for them, with the barronnes of the schire, or the maist famous persons. And all that are abone the extent of ane hundreth markes to cum to parliament under the paine of the auld unlaw.'*

'*But when fees holden of the King became sub-divided, and multiplied, two or more commissioners were admitted in Parliament, in name of the meaner barons and freeholders;* ***and all were accounted great barons, who held an hundred merk land, or above, of the King, and the rest, meaner barons* [my emphasis]*; Parl. 1503, c. 78.'* (Stair, *'The Institutions of the Law of Scotland'*, Vol. I, II.3.2)

***Google Maps Area Calculator Tool, accessed 13/7/2016.



****Being a dignity to which attaches a right to receive a summons to sit and vote in Parliament as a peer.

26. That, as a greater barony under the Act of 1503, as confirmed by Stair, the Barony of Mordington did not come within the scope of the Act of the Scottish Parliament of 1587 (see below), which related to the smaller barons and freeholders only.

27. That having been recognized as a greater barony by the Act of 1503, that status could not be removed except by a later statute using express words or by necessary implication. This doctrine, the fundamental presumption against taking away rights, is illustrated by two House of Lords cases; firstly, Managers of the Metropolitan Asylum District v. Frederick Hill and Others, Executors, &C. William Lund and Alfred Fripp [1880-81] L.R. 6 App. Cas. 193, where Lord Blackburn stated: *'On those who seek to establish that the Legislature intended to take away the private rights of individuals, lies the burden of shewing that such an intention appears by express words or necessary implication.'* and, secondly, Central Control Board (Liquor Traffic) v. Cannon Brewery Co Ltd [1919] A.C. 744, where Lord Atkinson stated: *'That canon is this: that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms.'* The key point is that the words of the Act of 1503 impose on the barons holding more than 100 merklands in extent, by statute, the duties of a peer of the realm; that is, the duty to attend Parliament as a noble. Since the duty is imposed by statute, the barons concerned are peers by statute. Thus, *'the duties of a peer of the realm were reserved as a service and condition of tenure'* (John Riddell, *'Inquiry into the Law and Practice in Scottish Peerages'*, Edinburgh, 1842, Vol. I, p. 103).

Feudal barons and lords of regality were peers of Scotland in 1707 with the right to attend the Scottish Parliament as members of the Estate of the Nobility in a manner identical to Lords of Parliament (holders of personal peerages created by letters patent), except only that they were not entitled to receive an individual summons.

28. That feudal barons were the original peers of Scotland, as tenants in chief of the King (‘peer’ is an Anglicization of the Latin word *‘pares’*, meaning ‘equal’), being tenants of the King of equal degree within the feudal hierarchy by virtue of holding their lands immediately of him, and they sat in parliament by virtue of being feudal barons, as did the earls, who also held their lands *‘per baroniam’* ('by barony'; a baron is defined as an immediate vassal of the King who holds jurisdiction of life and death within his barony (*furca et fossa* or ‘pit (*fossa*) and gallows (*furca*)’ - the right to hang men and drown women) in respect of certain criminal offences, such as theft and manslaughter). The immediate vassals of every feudal superior owed suit to the court of that superior, which was the forum in which they could obtain justice* (the jury consisted of their fellow tenants of equal degree - their ‘peers’ or ‘equals’, and the superior, as a litigant in his own court, had no greater rights than his own tenants), and the King’s Court, which evolved into Parliament, was simply an instance (although the highest instance) of such a court. All immediate vassals of a feudal superior were the peers of his court, so the barons were simply the peers of the King’s Court and, as such, peers of the realm (as opposed to, say, the immediate vassals of an earl, who were the peers of the earldom).

    *In the case of a non-baronial superior, only private justice governing the civil relationship between the superior and his tenants or between the tenants of the same superior was administered in the superior’s court. Public justice, which included criminal matters, was administered in the local sheriff court. The court of a baron, on the other hand, administered, in addition to the jurisdiction of an ordinary landowner, certain aspects of public justice (a slice, as it were, of the King’s justice) in relation to lesser criminal offences (such as theft and manslaughter, both of which carried the death penalty) to the exclusion of the sheriff court (although under the supervision of that court). Major criminal offences (murder, arson, rape and robbery - the Four Pleas of the Crown) were dealt with by the King’s itinerant Justiciars (The Justiciar of the South or The Justiciar of the North, as the case may be). Lords of Regality, on the other hand, exercised complete civil and criminal jurisdiction to the exclusion of the sheriff and the relevant Justiciar, who had no authority even to enter a regality. In civil matters an appeal lay from the regality court to Parliament.

29. That Lord Bankton, an institutional writer regarded as authoritative in Scottish courts of law, states, in his *'An Institute of the Laws of Scotland'* (II, III, para. 83), that *‘anciently all nobility, in the modern states, proceeded from such fees* [baronies and regalities]*: thus the title of Baron included that of Duke, Marquis and Earl, as well as that of Lord.* ***All barons were equally intitled, as Lords of Parliament, to sit and vote in it*** [my emphasis]*; the three estates, consisting of the clergy, barons and commissioners of shires. Some persons with greater merit or interest with the sovereign, were invested with higher privileges than barons, by erection of their lands into regalities. This* ***royal dignity*** [my emphasis] *implied an ample jurisdiction, extending even to capital crimes, and, in some particulars, exclusive of the king’s judges ordinary, or sheriffs; so that they were Reguli, or little kings; hence the kingdom was divided into royalty and regality: the Royalty were those parts which were immediately subject to the king’s judges; the Regality where the king’s judges had no access, unless, on particular occasions, it was indulged to them by special statutes.’*

30. That feudal barons retained their right to sit in the Scottish Parliament as peers but by an Act of Parliament of 1428 (which was never implemented) and a declaration of King James VI of 1587 implementing the Act of 1428, the small barons* (see below) were allowed to appoint

representatives (Commissioners) in each sheriffdom to represent them; they could still attend in person if they so wished.

*Originally, all titles or dignities (being originally only earldoms and baronies - the titles of viscount, marquis and duke were introduced later) were territorial, meaning that they were attached to an area of land via the legal 'head' (or *'caput'*), being the place where the courts of the earldom or barony were held (usually the castle or principle messuage - hence references in Crown Charters to *'the earldom of the castle of x'*), and a person was an earl or baron only by virtue of holding an area of land which had been erected by Crown Charter into an earldom or barony. The title passed with the ownership of the land (or rather, with the ownership of the *caput*, where the earldom or barony was held to subsist), and disposal required the King's consent via a resignation of the lands into the hands of the King and a re-grant to the new owner. Because these lands were held immediately of the King, the earl or baron owed suit to the King's Court, which evolved into Parliament over time; they were the peers of the King's Court, being equal in degree (Latin *'pares'* - hence 'peer') within the feudal hierarchy as the King's immediate vassals. Over time, as they ran out of demesne land, Kings started to grant personal titles which were not attached to land (and so which carried no lands with them), but which carried the right to sit and vote in Parliament because the recipient was created a 'Lord of Parliament' by letters patent. Hence, the holders of such personal titles were also considered to be 'peers', although they were not so in the proper feudal sense. Usually, at least in the early stages, recipients of personal tiles were also feudal barons (often feudal earls, which resulted in the grantee holding two earldoms with the same name; one feudal, one personal) and so were peers of the King's Court in any event. Since the recipients of such personal titles were invariably great magnates in high favour with the King, they began to eclipse the holders of territorial dignities in the political and social sphere. The holders of personal titles ('Lordships of Parliament' created by letters patent) became known as 'greater barons' and the holders of territorial titles became known as the 'smaller barons' (the rich and powerful tended to obtain personal dignities and so regarded themselves, as such, as 'greater' than those who were neither as rich or powerful, or as greedy and unscrupulous, as themselves). In addition, attendance at Parliament was expensive and often dangerous (political vendettas resulting in assassination were not uncommon), and lesser landowners did not regard attendance at Parliament as an honour but as a burden and a nuisance. It is for this reason that the 'smaller barons' were later excused from attending Parliament personally. Thus, people who were not strictly peers at all in the proper feudal sense replaced those who were.

A similar process happened in England, whereby the 'old baronage', the barons by tenure, 'lost' their right to attend Parliament and the King 'acquired' the right to summon to Parliament anyone he pleased - by issuing a writ of summons to them. This gave rise to the name of such peerages, namely 'baronies by writ'. It should be noted that the King had always had the right to summon any subject to give him advice and counsel, but what he did not have was a right to impose extraordinary aids (in other words, levy taxes) without the consent of his vassals.

This process gave rise to an extraordinary, indeed inconceivable, situation as explained by Henry Hallam in his *'Middle Ages'* (John Murray, London , 1901, Vol. III, p. 240): *'there is surely a great difficulty on the opposite side, in the hypothesis that, while it is acknowledged that there were, in the reign of Edward I and Edward II, certain persons holding by barony and called peers of the realm, it could have been agreeable to the feudal or to the English constitution that the King, by refusing to the posterity of such barons a writ of summons to Parliament, might deprive them of their nobility, and reduce them forever to the rank of commoners.*'

It is clear that the right of a vassal to attend his immediate superior's court as a peer of that court could not be removed without dismantling the entire foundation of the feudal system since it would remove the vassal's right to obtain justice. Put simply, how can a man obtain the

judgement of his peers (his fellow vassals of equal degree) if those peers are not allowed to attend the court? Furthermore, such a fundamental alteration in the feudal relationship between the King and his immediate vassals would have been impossible under feudal law without the consent of those vassals, and those vassals would hardly have consented to grant to the King the power to deprive them of their nobility forever at his own whim. This is a circle that cannot be squared.

It is clear then that the right of English feudal barons at attend Parliament as peers has not been abrogated in any way, either by statute or by desuetude, and, in fact, the Tenures Abolition Act 1660 specifically preserved any right to sit arising from the holding of any title of honour. s.10 states that the Act *'shall not infringe or hurt any title of honour, **feudal*** [my emphasis] *or other, by which any person hath or might have right to sit in the Lords House of Parliament, as to his or their title of honour, or sitting in Parliament, and the privilege belonging to them as Peers*'. In the Berkeley case of 1861, the Committee for Privileges acknowledged that s.10 preserved the right to sit arising from the holding of a feudal barony but asserted (nonsensically) that the Act had 'converted' feudal baronies into baronies by writ. Lord St. Leonards said: *'The right to sit* [in the House of Lords] *is saved* [by s.10]*, but it no longer depends upon the tenure which is extinguished. The title of Honor was left as a substantive personal right. The tenure was not saved in the particular instance in order to save the title of Honor, but the title of Honor was itself saved although the tenure was destroyed.... There is, indeed, a Barony of Berkeley, not depending on tenure still existing.'* But while the Act abolished tenure by barony it preserved baronies by tenure; it simply replaced one form of holding *in capite* (in chief of the King), tenure by barony, with another form of holding *in capite*; tenure by free and common socage. Nothing in the Act expressly provided or necessarily implied that the title of honour would no longer be attached to land and would become a personal title, and the presumption against taking away rights precludes such an outcome. In fact, the honourable services of grand sergeantry (being any service provided personally to the King - holding the King's head while crossing the Channel, presumably to cure or prevent sea sickness, was an example) were preserved by the Act still attached to the land, even though tenure by grand sergeantry, being a tenure *in capite*, was abolished. This proves that an honourable service akin to holding by barony (where the honourable service was to administer a part of royal justice) could remain attached to land held by free and common socage, so the question is why, if the honourable services of grand sergeantry could survive in such a way, that baronies could not. For instance, the office of Queen's (or King's) Champion and Standard Bearer of England is still attached to the ownership of the Manor of Scrivelsby.

Henry Dymoke (1801–1865), King's Champion, throwing down the gauntlet at the coronation of George IV in 1821 (Robert Huish, *'An Authentic History of the Coronation of His Majesty King George the Fourth'*, 1821).

The result of the Berkeley claim was therefore fudged. The claim was to a peerage arising from tenure by barony, but the Committee ruled that tenure by barony had been abolished in 1660, so that no claim to a peerage could be based on such a tenure (although the Committee clearly could have ruled that a barony by tenure still existed). The claimant did not claim to hold a barony by writ so, even though it was ruled that such a peerage existed (being a different barony by writ from those created in 1295 and 1421, since it 'arose' in 1660 out of the original feudal barony of c.1155 on the passing of the Tenures Abolition Act 1660), no such peerage was recognized (the claimant was also illegitimate and could not therefore have succeeded to any barony by writ held *de jure* by his father). The claimant therefore got nothing. However, he was created Baron Fitzhardinge by letters patent six months later. Thus, again, a title was created out of nothing rather than recognize a feudal barony which had been acknowledged to exist for many years (c. 1155 to 1295 at least). *'Until (1295) 23 Edw. I, the ancestors of Thomas de Berkeley, who in that year was sum. to Parl., were unquestionably Barons of the realm by tenure of the Castle and Honour of Berkeley.'* (*'Complete Peerage'*, Vol. II, p. 119, quoting Sir. N. H. Nicholas, *'Nicholas'*, p.21). In addition, I. J. Sanders gives details of 132 certain English feudal

baronies (there are numerous probable baronies as well) in his *'English baronies: A study of their origin and descent 1086-1327'*, Clarendon Press, 1960).

Nonetheless, the decision in the Berkeley Peerage Case is still good law (until reversed). It follows that the Tenures Abolition Act 1660 did to English feudal baronies exactly what the Abolition of Feudal Tenure etc. (Scotland) Act 2000 did to Scottish feudal baronies; that is, it destroyed the feudal tenure, made the title a personal right, but expressly stated that it had no effect on any other aspects of (rights parcel with) the title, necessarily including any right to sit and vote in the House of Lords. s.63 Abolition of Feudal Tenure etc. (Scotland) Act 2000 says *'nothing in this Act affects the dignity of baron'* and this equates to s.10 Tenures Abolition Act 1660, which says that the Act *'shall not infringe or hurt any title of honour, feudal or other, by which any person hath or might have right to sit in the Lords House of Parliament, as to his or their title of honour, or sitting in Parliament, and the privilege belonging to them as Peers'*. What this means is, in effect, that I cannot be claiming in respect of a feudal barony because there are no longer any Scottish feudal baronies (feudal tenure having been abolished); I must, according to the Berkeley Peerage Case of 1858-1861 (that is, on the authority of the House of Lords itself), be claiming in respect of a barony by writ (or possibly a barony created by statute or operation of law).

The parallels between the two claims (the Berkeley Peerage Case and my peerage claim) are striking, both being in respect of ancient feudal baronies, or what were feudal baronies which were converted into personal titles by operation of an Act of Parliament which abolished the underlying feudal tenure. The question remains of how English feudal baronies can have been peerages and continued as such until 1660, when they became personal peerage titles, as confirmed by the House of Lords itself in the Berkeley Peerage Case of 1858-1861, while Scottish feudal baronies were, it is claimed, never peerages, even though they were, in all the essentials, identical (the latter being modelled on the former; that is, Scottish feudalism was essentially introduced as an imitation or copy of English feudalism), when the Scottish feudal barons continued to sit in Parliament as nobles long after English feudal barons had ceased to do so, and when the underlying feudal tenure was also abolished by an Act of Parliament which protected all other (non-feudal) aspects of baronies. In short, if English feudal baronies ended up as personal peerage titles, how can Scottish feudal baronies not have done the same, when they were originally the same and their underlying feudal nature was abolished in an identical manner (preserving all non-feudal aspects, including any right to sit and vote in the House of Lords)? It is rather like taking two sets of identical cake-making ingredients (inputs), putting those ingredients through identical cake-making processes (processing), but ending up with two completely different cakes (outputs). How can this be possible? In law it can't.

The fact that the holders of 'modern peerages' (personal titles created by letters patent) have usurped the original and proper peers of the realm (the feudal barons), including all their colourful trappings, such as coats of arms, explains their hostility towards feudal titles and their refusal to recognize such titles as peerages. A usurper always resents the person he has usurped and invariably seeks to delegitimize him - because to legitimize a person you have usurped amounts to acknowledging your own illegitimacy - to some degree at least.

31. That this right (and duty - from which the small barons were only exempted on the condition that they appointed Commissioners to represent them) did not fall into desuetude (disuse), as some have argued (Sir Thomas Innes of Learney, *'Scots Heraldry'*, 2nd Ed., 1956, p. 130*), because under Scots law an Act of Parliament cannot fall into desuetude by mere non-usage, even for the greatest length of time, in the absence of some *'positive act showing the intention of the community to repeal it by contrary practice'* (William Bell, *'A Dictionary and Digest of the Law of Scotland'*, Edinburgh, 1838, p. 298) and no-one has identified such a positive act before 1707 (not doing something is not a positive act of course).

*The fact that Sir Thomas Innes of Learney (Lord Lyon 1945-69) argued that the right to attend Parliament had fallen into desuetude after 1633 (45 years after 1587) meant that he acknowledged that the right to attend Parliament was not abolished by the Act of 1587 and still existed after 1587 (because it cannot have fallen into desuetude in 1633 if abolished by an Act of Parliament in 1587). Thus, the Lord Lyon, a judge in the Scottish legal system, has acknowledged that the 1587 Act did not remove the right of feudal barons to sit in Parliament as peers; the issue is solely whether that right was lost through non-use (which it clearly wasn't, as shown below).

32. That, in addition, the right to sit in parliament was both a private right and a public duty (the baron represented the land of his barony in parliament) but even if a private right could only have been lost by negative prescription (i.e. non-use) if the right was one in which two parties were directly interested, so that while one party lost a right the other gained immunity from it, but where a right concerns *'the privileged person only, without directly affecting others, or, in other words, when it is what is termed res mera facultatis, no lapse of time can diminish or take away the right'* (Lord Daer v The Hon. Keith Stewart and Other Freeholders of the County of Wigton, Court of Session, 1792. See also Lord Kames *'Elucidations'* and Erskine, Book I, Tit. I, Sec. 46).

33. That, in addition, Lord Corehouse, in McDonnell of Glengarry v Duke of Gordon, Feb. 26, 1828 (6 S. & D. 600.), said: *'If there be a principle well settled in the law of Scotland, it is this - that the right of ownership in a feudal subject, being complete, cannot suffer the negative prescription ...'*. This case concerned the right of patronage of a particular church (i.e. the right to appoint the minister of the church) so it relates to a right arising out of ownership of land.

34. That, in addition, Sir Thomas Innes of Learney refers (*'The Robes of the Feudal Baronage of Scotland'*, P.S.A.S, Vol. LXXIX, p. 144) to the case of Sundry Barons v. Lord Lyon (1672) (*'Brown's Supplement*', Vol. III, p. 6) where those sundry barons *'successfully maintained, in claiming their supporters, that they were as good Barons after that Act (1587) as before'*. **This case confirms that feudal barons enjoyed the same rights in 1672 (a mere 35 years before the Treaty of Union of 1707) as they had enjoyed before the Act of 1587, when they were undeniably peers of Scotland.** Note that this case was related by Lord Fountainhall but that he did not record the decision. However, he notes that Lyon grants '*supporters now to some who were in possession of them of old'* (quoted in Stevenson, *Heraldry in Scotland*, James Maclehose & Sons, Glasgow, 1914, p. 314) and this would only have happened if the sundry barons were successful in their action.

35. That the return by the Lords of Session (the judges of the Court of Session, Scotland's highest civil court) to Parliament dated 12/6/1739 (Nisbet, *'System of Heraldry*', Vol. II, Part IV, p. 181) stated: *'First then, they* [the Lords of Session] *take the liberty to remark, that they cannot discover in the records any **patent*** [my emphasis] *of honour creating a peerage, earlier than the reign of king James VI. **Before that time, titles of honour and dignity were created by erecting lands into earldoms and lordships*** [my emphasis]*, and probably by some other method that cannot now, in matters so ancient, be with any certainty discovered : For a great many noble families appear, from the rolls of Parliament, to have sat and voted in Parliament as lords of Parliament, though no constitution of the peerage, or title of honour under which they sat, can be now found in the records : But as the constitution in most ancient cases does not appear, and the chiet evidence of the titles being hereditary is the successor's regularly possessing the predecessor's rank in Parliament, it is not possible, without hearing the allegations that may be made, and examining the evidence that may be brought by contending parties, to form any judgment of the limitations of **such ancient peerages*** [my emphasis]*.'* This reference to feudal titles as 'ancient peerages' makes it clear that in 1739 the Court of Session (Scotland's highest civil court) accepted that ordinary feudal baronies (and earldoms and lordships were ordinary

feudal baronies in that they were held *'per baroniam'* in the same manner as all other feudal, non-regality, baronies) were then peerages; that is, in 1739. The question is about what it was that made a feudal earldom a peerage. Clearly, it can only have been the right to sit and vote in Parliament as a noble; it certainly wasn't the right to wear some sort of funny hat. But, if this is the case, then why aren't all others who have the same right not also peers? Their Lordships did not ask themselves this question - a strange oversight. One would have thought that when they were asked to produce a list of peers of Scotland, the first thing they would have done was to define the meaning of the word 'peer'. This is the most basic part of any legal process, which nearly always revolve around the meaning of words (e.g. 'What does the word 'assault' mean?').

36. That, in 1599 (i.e. after the Act of 1587) King James VI of Scotland (and I of England) wrote of the feudal barons in his *'Basilikon Doron'* (Book II) that *'the small barons are but an inferior part of the Nobilitie and of their estate'*.

37. If a feudal baron was a member of the nobility and of the same Estate in Parliament (the Estate of the Nobility) and had the right to sit and vote in Parliament as a member of that Estate and was a Lord of Parliament (according to Bankton) and never ceased to be such (according to Sir George Mackenzie, as quoted below), then how can it be asserted that a feudal baron was not a peer in 1707? Even exclusion from the Union Roll, the official list, is not enough, because if two people demonstrably have the same right (to sit and vote in Parliament as nobles) and it is that right that makes a person a peer in the first place, then they are both peers and must be treated accordingly. Interestingly, the Dukedom of Rothesay was excluded from the Union Roll in 1707 but this did not prevent that peerage (which was and is a feudal barony) being included in the roll of Scottish peers in 1714.

38. The right of the 'greater barons' to receive an individual summons, which was the only difference between them and the 'small barons' in terms of their Parliamentary rights, makes no difference because the underlying right (to sit and vote as a noble) is the same; it is just the method of being called to exercise that right that is different. Clearly, it is the substance that matters, not the form.

39. The same applies to being expressly created a 'Lord of Parliament' by letters patent, because being so created only gave the right to an individual summons. This is a circular argument; a person is a 'Lord of Parliament' because he has the right to an individual summons, but he only has the right to an individual summons because he is a 'Lord of Parliament'. The real issue is what it was that the right to an individual summons gave him a right to do, which was to sit and vote in Parliament as a noble - and the feudal barons also had that right.

40. That Sir Thomas Innes of Learney states, in his *'Scots Heraldry'* (2nd Ed., 1956, p. 131), the standard reference work on Scots heraldry, that ***'Statute 1587, cap. 120, was a relieving and not a disabling Act.*** [my emphasis]***'*** In other words, the Act of 1587 did not prevent the small barons from attending Parliament as nobles, it merely relieved them of the duty to attend Parliament as nobles on the condition that they appointed Commissioners of the Shires to represent them.

41. That Sir George Mackenzie, an institutional writer regarded as authoritative in Scottish courts of law, as quoted by Seton ('*The Law and Practice of Heraldry in Scotland*', p. 294), states (*'Science of Heraldry'*, Chap. XXXI) that barons *'were members of Parliament with us, as such, and* ***never lost that privilege*** [my emphasis]*, though, for their conveniency, they were allowed to be represented by two of their number (in each shire)'*.

As peers of Scotland in 1707, feudal barons and lords of regality became peers of Great Britain in 1707.

42. That, for these reasons, the small barons were Peers of Scotland (that is, they had the right to sit and vote in Parliament as nobles in exactly the same way as Lords of Parliament, except for the method of being summoned to exercise that right) and continued to be such until 1707, at which time they became Peers of Great Britain under Article 23 of the Treaty of Union 1707, which states: *'…**that all Peers of Scotland, and their successors to their Honours and Dignities, shall from and after the Union be Peers of Great Britain*** [my emphasis]*, and have Rank and Precedency next and immediately after the Peers of the like orders and degrees in England at the time of the Union, and before all Peers of Great Britain of the like orders and degrees, who may be Created after the Union, and shall be tryed as Peers of Great Britain, and shall Enjoy all Privileges of Peers, as fully as the Peers of England do now, or as they, or any other Peers of Great Britain may hereafter Enjoy the same except the Right and Privilege of sitting in the House of Lords and the Privileges depending thereon, and particularly the Right of sitting upon the tryals of Peers.'*

43. That, for these reasons, the Barony of Mordington, even if it is not a greater barony under the Act of the Scottish Parliament of 1503 (c. 78) is, as a smaller barony, still a peerage.

44. The key question is then, given that the feudal barons were undoubtedly peers of Scotland, when and how did they lose that status before 1707? By statute? No, as shown above. By desuetude? No, as shown above. How then? If they did not lose that status before 1707 then, as peers of Scotland at that time, they became peers of Great Britain under Article 23 of the Treaty of Union 1707 and their successors to their honours and dignities are also peers.

45. That the word 'peer' must have the same meaning in the Treaty and both Acts of Union of 1706 and 1707 and that word must be used consistently within each document. Now, the word 'peer' in an English context means 'a person who holds a title of nobility which entitles the holder to sit and vote in the House of Lords - or, rather, to sit and vote in Parliament as a noble' (R.P. Gadd, *'Peerage Law'*, ISCA Publishing, 1985, p. 2), since there was no separate House of Lords in Scotland and the three estates (nobility, clergy and burgh representatives) sat in one place. There has never been a concept in English law of a person who has such a right and is not a peer (until 1999 that is). **Thus, in an English context, the word 'peer' meant anyone who had the right and no-one who had the right could be excluded from that meaning. Since this is the undoubted meaning in the English Act, it follows that it must also be the meaning in the Treaty and in the Scottish Act. To say otherwise would mean having to assert that the word 'peer' was given a meaning in the English Act which it had never been given before and has never been given since (until 1999). Further, the Treaty and the Acts, by giving peers equal rights, clearly mean that the word 'peer' refers to those who have equivalent rights in each country. Thus, the peers of Scotland must be taken to consist of those people in Scotland who had rights equivalent to those who were peers in England; in other words, those people in Scotland who had the right to attend Parliament as nobles. This definition includes the 'small barons' because they had the right to attend Parliament as nobles.**

The petitioner is a Lord Temporal.

46. That Lord Halsbury ('*The Laws of England*', Butterworth & Co., London, 1909, Vol. 22, p. 277) says that *'the body of Lords Spiritual and Temporal is an entity distinct from any House of Parliament'* and in a note on that page he says: *'There are persons in possession of dignities, both ecclesiastical and lay, who are not peers of Parliament, but are, it is apprehended, lords of the realm. Bishops and prelates, barons by tenure* [my emphasis]*, if any, are examples; for the*

occupants of ancient episcopal sees are to some extent disqualified, and a baron by tenure [in England] could claim no writ of summons to the House of Lords. They may nevertheless be lords spiritual or temporal.' and that, accordingly, the petitioner is a Lord Temporal regardless of whether he is a Peer of the Realm.

47. That the consent of the Lords Temporal to the proclamation of a new sovereign is necessary (Lord Halsbury, *'The Laws of England'*, Butterworth & Co., London, 1909, Vol. 22, p. 277, note. n); that is, any proclamation of a new sovereign without the consent of the Lords Spiritual and Temporal is null and void. They have a statutory duty under s.1 Act of Settlement 1700, which says: *'And thereunto **the said Lords Spirituall and Temporall*** [my emphasis] *and Commons shall and will in the Name of all the People of this Realm most humbly and faithfully submitt themselves their Heirs and Posterities and **do faithfully promise*** [my emphasis] *That after the Deceases of His Majesty and Her Royall Highness and the failure of the Heirs of their respective Bodies **to stand to maintain and defend*** [my emphasis] *the said Princess Sophia and the Heirs of Her Body being Protestants according to the Limitation and Succession of the Crown in this Act specified and contained to the utmost of their Powers with their Lives and Estates against all Persons whatsoever that shall attempt any thing to the contrary.'*

The Abolition of Feudal Tenure etc. (Scotland) Act 2000 is void as contrary to the Scotland Act 1998 and as in breach of the European Convention on Human Rights.

48. That the Abolition of Feudal Tenure etc. (Scotland) Act 2000 is void as contrary to the Scotland Act 1998 to the extent that it purports to abolish baronial jurisdiction and detach baronies from the land, because feudal baronies (and the jurisdiction is the barony - they are one and the same thing) are dignities created by Crown Charter* and, as such, are a reserved matter beyond the legislative competence of the Scottish Parliament (Sch. 5, Scotland Act 1998) and that, accordingly, any Act of the Scottish Parliament in respect of them *'is not law'* (s.29 Scotland Act 1998).

    *As per Lord Clyde in Spencer-Thomas of Buquhollie v Newell (1992 SLT 973): *'Before going further I should say something about the nature of a barony in Scots law . **A barony is an estate of land created by a direct grant from the Crown.*** [my emphasis] *The original grant is said to have erected the lands into a libera baronia, a freehold barony (Bell's Principles, s.750). The right can be conferred only by the Crown and cannot be transmitted by the baron to be held base of himself (Bell's Dictionary (7 th ed.), p. 99; Bankton's Institute, II.iii.83). In feudal classification, a barony falls into the class of noble as opposed to ignoble feus. That classification is discussed by Craig (Jus Feudale, I.x.16) and Bankton (II.iii.83).'* This is not quite correct. A barony is not an estate of land, it is a jurisdiction over land. This is why the phrase 'the lands and barony of x' appear in Crown charters. The lands and the barony were two distinct things; land and a jurisdiction (of a certain type i.e. of life and limb) over that land. But a barony held of the King could only be created by the King. It was conferred by a royal grant (called a Crown Charter when in written form - in the early days the grant was made by handing over a sod of earth). The erection of lands into a barony was an exercise of the royal prerogative.

49. That with respect to what qualifies as a 'dignity', see Bankton, II.iii.84, Erskine, *'Institutes'*, II.iii.46, Stair, *'Institutions'*, II.iii.45 and George Joseph Bell, *'Principles'*, 10th Ed., para. 750. The *'Oxford Companion to Law'* defines *'dignity'* as *'the right to bear a title of honour or of nobility'*. As shown above, Lord St. Leonards, in the Berkeley Peerage Case of 1861, described the feudal Barony of Berkeley as a *'title of honour'*. So, we have a feudal dignity being described by a Law Lord as a *'title of honour'*, which the *'Oxford Companion to Law'* tells us is a *'dignity'*. So, we have it on the highest authority that an English feudal barony is a *'dignity'* and it follows that a

Scottish feudal barony (which is, in essence, of the same nature, but which retained its privileges until a much later date) is also a *'dignity'*. *'What is DIGNITY? In English law. An honor; a title, station, or distinction of honor. Dignities are a species of incorporeal hereditaments, in which a person may have a property or estate. 2 Bl. Comm. 37; 1 Bl. Comm. 396; 1 Crabb, Real Prop. 468, et seq.'* (http://thelawdictionary.org/dignity/, accessed 15/6/2016).

50. Further, Acts of the Scottish Parliament are not law to the extent that they contravene EU law or infringe upon rights protected by the European Convention on Human Rights (s.29(d) Scotland Act 1998) and the Abolition of Feudal Tenure etc. (Scotland) Act 2000 abrogated certain property rights of feudal barons without compensation and in a manner that was neither proportionate nor necessary in a democratic society. This on the basis that the House of Lords itself is an unelected (and partly hereditary) second legislative chamber, and if its existence is justified in a democratic society then it cannot convincingly be claimed that any comparable rights of unelected and hereditary feudal barons (though of a judicial rather than a legislative nature) are not so justified. In short, if unelected and/or hereditary holders of an office or dignity can make the law, it follows that unelected and/or hereditary holders of an office or dignity can interpret the law (although, in fact, this was done by the peers of the court, not the baron; the baron's role was simply to administer the court, and even this was usually done via a baillie). The latter is, in fact, rather less objectionable than the former.

The Treaty of Union 1707 is binding and unalterable and confers rights on individuals enforceable in domestic courts.

51. That in relation to claims to Irish peerages in abeyance, the current (October 2017) Standing Orders of the House of Lords Relating to Public Business state (para. 80(4)) (my emphasis): *'In case it shall appear to the House that any such Peerage is in abeyance, the House shall inform Her Majesty that in the opinion of the House such Peerage, though in abeyance, is to be deemed and taken to be an existing Peerage, <u>according to the Fourth Article of Union</u>.'*

52. That, on this basis, it is clear that the Treaty of Union (referred to as such in the Fourth Article in the Union with Ireland Act 1800) is treated, even today, as conferring rights on individuals which apply in (can be enforced in) domestic courts. The right in this case is the right to have a peerage in abeyance treated as an existing peerage and the court in which the right can be enforced is the place where the claim to such a peerage would be considered; the House of Lords. Note that the Act of 1800 did not enact the provisions of the treaty in English law, it merely recorded that *'The Parliaments of England and Ireland have agreed upon the articles following:* […]*'*, so it cannot be the Act that is reflected in the Standing Orders, it must be the relevant provision of the Treaty itself. The House of Lords cannot invent peerage law on its own initiative, so it can only be applying law which is considered to be in force.

53. <u>That if the House of Lords considers itself bound by Article 4 of the Treaty of Union with Ireland relating to peerage rights, even though that treaty no longer exists as a treaty (the Act of the Irish Parliament ratifying the treaty having been repealed by the Irish Parliament (Dáil) in 1962), is it not also bound by the relevant articles of the Treaty of Union with Scotland relating to peerage or other rights, which treaty does still exist?</u>

54. That the Treaty of Union 1707 is the founding constitutional document of the state of Great Britain and its successor states, and of the Parliament of Great Britain and its successor Parliaments, and is the document from which they derive their existence, state, being and authority.

55. That the Treaty of Union 1707 was intended by the parties to protect the rights and interests of those parties after the Union in perpetuity, as specified in the Treaty and including the rights

and interests of individual citizens where relevant, and that Parliament has no authority to abrogate the document which created it and which defines and limits its own powers (Jackson & Ors v. Her Majesty's Attorney General [2005] UKHL 56 at 106 and 107, AXA General Insurance Ltd & Ors v. The Scottish Ministers & Ors [2011] ScotCS CSIH 31 at 62 et seq. and Whaley v Lord Watson 2000 SC 340 at pp. 357-8 where Lord Prosser said: *'If and in so far as a parliament may have powers which are not limited by any kind of legal definition, there is no doubt scope for concepts of 'sovereignty', with the courts unable to enforce boundaries which do not exist. But if and in so far as a parliament and its powers have been defined, and thus limited, by law, it is in my opinion self-evident that the courts have jurisdiction in relation to these legal definitions and limits, just as they would have for any other body created by law.'*).

56. That, as the founding constitutional document of the state of Great Britain and the Parliament of Great Britain, and their successors, the Treaty enjoys a protected constitutional status above that enjoyed by constitutional Acts of Parliament, such as the European Communities Act 1972 (Thoburn v Sunderland City Council [2002] EWHC 195 (Admin) at 60-64), and cannot therefore be amended or abrogated in any way, other than as provided for in the treaty itself or by employing the same procedures which were used to negotiate the original treaty; that is, by agreement between England and Scotland at the state level. The possibility of a hierarchy of constitutional laws was acknowledged in R (on the application of HS2 Action Alliance Limited) v The Secretary of State for Transport and another [2014] UKSC 3 at 206-208. See also Mark Elliot, *'Reflections on the HS2 case: a hierarchy of domestic constitutional norms and the qualified primacy of EU law'*, ukconstitutionallaw.org/2014/01/23/mark-elliot-reflections-on-the-hs2-case-a-hierarchy-of-domesticconstitutional-norms-and-the-qualified-primacy-of-eu-law/, accessed 18/7/2016.

57. *'Reports of the Lords Committees touching the Dignity of a Peer of the Realm'*, ordered to be printed 18/5/1829, Vol. 1, p. 121 says (my emphasis): *'the Constitution of the Two Houses of Parliament of Great Britain was thus definitively settled, except as it might be altered by a Legislative Act, consistent with the Terms of the Treaty of Union.'* In other words, the Treaty of Union can be altered by an Act of Parliament, but only to the extent allowed by the Treaty, which in many respects is not at all.

58. That Lord Steyn recognized the possibility of limitations on the sovereignty of Parliament based on fundamental constitutional principles (one of which must be limits placed on the power of Parliament by the document which founded Parliament). He said in Jackson & Ors v. Her Majesty's Attorney General [2005] UKHL 56 at 102: *'The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. **If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism.*** [my emphasis] *In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish. It is not necessary to explore the ramifications of this question in this opinion. No such issues arise on the present appeal.'*

59. That, as the founding constitutional document of the state of Great Britain and the Parliament of Great Britain, and their successors, the Treaty confers rights and obligations which are enforceable in domestic courts, because if the rights and obligations are not enforceable in domestic courts, they would not be enforceable at all*, and it was clearly not the intention of

the parties to confer rights which were not enforceable and, as such, non-existent (Occidental Exploration & Production Company v Republic of Ecuador [2005] EWCA Civ 1116 at 19).

*This is on the basis that the Treaty is no longer an international treaty enforceable in international courts under international law, because international law concerns the relationships between sovereign states and England and Scotland are not sovereign states but constituent parts of one sovereign state.

60. That Article 25 of the Treaty of Union 1707 renders void any law or enactment which is inconsistent with the Treaty.

61. That, on this basis, the Heritable Jurisdictions Act 1747, the Peerage Act 1963, the House of Lords Act 1999 and the Abolition of Feudal Tenure etc. (Scotland) Act 2000 are void to the extent that they conflict with the Treaty of Union 1707, and that the petitioner is therefore entitled to:

- vote in the elections of representative peers;
- stand for election as a representative peer;
- enjoy the privileges of peers as they existed in 1707;
- exercise the jurisdiction and *jura regalia* of a baron and a lord of regality and enjoy all the other rights of a baron and a lord of regality as they were in 1707.

62. That if the Treaty is still a treaty under international law, it is enforceable in domestic courts and may be enforceable in domestic courts even if it is no longer a treaty under international law. Blackstone (*'Commentaries on the Laws of England'*, Vol. IV, Ch. 5) defines international law as follows: *'The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith in that intercourse which must frequently occur between two or more independent states,* ***and the individuals belonging to each*** [my emphasis].*'* He goes on: *'In arbitrary states this law, wherever it contradicts, or is not provided for by, the municipal law of the country, is enforced by the royal power; but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction****) is here adopted in its full extent by the common law, and is held to be a part of the law of the land*** [my emphasis]***.*** *And those acts of parliament which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom, without which it must cease to be a part of the civilized world.'*

63. That in Occidental Exploration & Production Company v Republic of Ecuador [2005] EWCA Civ 1116 it was stated at 19: *'That treaties may in modern international law give rise to direct rights in favour of individuals is well established, particularly where the treaty provides a dispute resolution mechanism capable of being operated by such individuals acting on their own behalf and without their national state's involvement or even consent. Oppenheim's International Law (9th Ed.), para. 375 put the matter in this way in 1992: "States can, ... and occasionally do, confer upon individuals, whether their own subjects or aliens, international rights strictu sensu, ie rights which they can acquire without the intervention of municipal legislation and which they can enforce in their own name before* ***international tribunals*** [my emphasis]***."*** *See also Oppenheim, para. 7, as well as McCorquodale, The Individual and the International Legal System in Evans' International Law (OUP) (2003), pp. 304-6. Most frequently cited in this connection is the Permanent Court of International Justice's Advisory Opinion in the Jurisdiction*

of the Courts of Danzig Case (1928) PCIJ Rep Series B No. 15, p.1, considering the effect of a treaty (the Beamtenabkommen) made on 22 October 1921 between Poland and Danzig. The Beamtenabkommen regulated the employment conditions of Danzig railway employees who had, after the First World War, passed into the service of the Polish Railways Administration. Poland's contention that this treaty only created inter-State rights was rejected. The Court said that: "It may be readily admitted that, according to a well established principle of international law, the Beamtenabkommen, being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, ***according to the intention of the contracting Parties*** [my emphasis]*, may be the adoption by the Parties of some definite rules creating individual rights and* ***enforceable by the national courts*** [my emphasis]*. That there is such an intention in the present case can be established by reference to the terms of the Beamtenabkommen. (pp.17-18)"'*

64. That the question of whether the Treaty of Union of 1707 remains binding was considered by the Committee for Privileges of the House of Lords in 1999 before the passing of the House of Lords Act 1999. The question was whether the Act would contravene Article 22 of the Treaty of Union by removing the right of Scottish hereditary peers to sit in the House of Lords. The unanimous opinion of the Committee was that it would not, although only the three law lords involved gave their written reasons. These were Lord Slynn of Hadley, Lord Nicholls of Birkenhead and Lord Hope of Craighead. **The first point to note is that, despite their verbal gymnastics, none of these law lords expressed the view that the Treaty of Union does not exist, which they clearly would have done if they had considered this to be the case. We may certainly take it then that they considered that the Treaty does exist (and the report refers to the Treaty of Union - see below); the question was merely whether what was proposed (the removal of Scottish hereditary peers from the House of Lords) was permitted by the Treaty. The report states: *'That it is the unanimous opinion of the Committee that the House of Lords Bill (as amended on Report) would not, if enacted, breach the provisions of the Treaty of Union between England and Scotland.'* These words can only mean that the Committee accepted that there is such a thing as the 'Treaty of Union', which, being a 'treaty', is, unsurprisingly, an agreement between two states governed by international law.**

65. That the main reason given by the three law lords for saying that the Treaty allowed for the removal of Scottish hereditary peers from the House of Lords was that the doctrine of the supremacy of Parliament allowed Parliament to amend the Treaty; indeed, to make any laws it likes. **However, they overlooked the fact that international law on treaties (Vienna Convention on the Law of Treaties 1969, Article 46) holds that an internal law (such as the supremacy of parliament) cannot be used to circumvent a treaty unless (1) the violation of that internal law was manifest at the time of signing and (2) the internal law is fundamental.** While the doctrine of the supremacy of parliament is clearly fundamental, it was not manifest at the time (1707) because the English parliament held itself out as being able to bind itself permanently by the Treaty of Union and the Scottish parliament believed that to be the case. This was because the doctrine of the supremacy of parliament was not developed until long after the Treaty of Union (it was first comprehensively formulated by of A. V. Dicey in his *'An Introduction to the Study of the Law of the Constitution'* of 1885, although the supremacy of Parliament over the Crown was established by the Bill of Rights 1689). While the Vienna Convention is not retrospective, it can be taken as a clear guide to international law before it came into effect. In short, a country cannot use an internal law or doctrine existing at the time of signing to circumvent a treaty (subject to the exception above) or 'develop' an internal law or doctrine after a treaty has been signed and then use that law or doctrine to circumvent the treaty. If this was not the case, then treaties would not be worth the paper they are written on because they could simply be circumvented by one of the parties claiming to have developed an internal law. On the other hand, if the English Parliament was not bound by the Treaty of

Union in 1707 by virtue of the supremacy of parliament then it certainly misled the Scottish Parliament* into thinking that it could agree to binding and unalterable treaty terms. In this case the treaty would be void for fraud (Vienna Convention on the Law of Treaties 1969, Article 49).

*Note, in particular, part of the case for Lord Grey which says (para. 20):

'In respect of the earlier debate on Article III, on 18 November 1706, Defoe records ['*History of the Union between England and Scotland*', 3rd edtn London, John Stockdale, 1786] *that: "The capital arguments made use of on this occasion . . . were such as these:-*

1. That whatever agreement is now concluded between the two kingdoms, will never be binding to the new Parliament.
2. That the two kingdoms effectually subject themselves to the new Parliament, all the conditions stipulated on either side to the contrary in any wise notwithstanding.

To this it was answered, That the British Parliament were absolutely bound up by the stipulations of this treaty; that they being a subsequent power to the two respective Parliaments of either kingdom, had no other or farther power to act than was limited to them by the stipulations of both kingdoms ... That the Parliament of Britain, being the creature of the Union, formed by express stipulations between the two separate Parliaments of England and Scotland, cannot but be unalterably bound by the conditions so stipulated, and upon which it received its being, name and authority."'

Thus, the intention and understanding of the Scottish Parliament was made abundantly clear.

66. That we can therefore conclude that:

- A treaty exists;
- That treaty, being a treaty, is governed by international law;
- That treaty cannot be overruled on the basis of parliamentary sovereignty.

67. That the fact that the doctrine of the supremacy of Parliament was not developed until long after 1707 is proved by the case of Wilkes v Wood [1763] EWHC CP J95 where Lord Chief Justice Pratt said: *''No precedents, no legal determinations, not an Act of Parliament itself, is sufficient to warrant any proceeding contrary to the spirit of the constitution.'* Thus, some 50 years after the Treaty was signed, the Lord Chief Justice ruled that an Act of Parliament cannot override the constitution, which constitution must clearly include the document from which Parliament derives its existence, state, being and authority.

68. That in an article of June 2007, *'The Union and the Law'* (The Journal of the Law Society of Scotland), David M. Walker, Regius Professor of Law at the University of Glasgow 1958-1990, wrote: '*In his judgment in McCormick v Lord Advocate 1953 SC 396 Lord President Cooper, admittedly obiter, observed that the principle of the unlimited sovereignty of the Westminster Parliament was a distinctively English principle which had no counterpart in Scottish constitutional law. In particular the Lord Advocate had conceded in that case that the Parliament of Great Britain could not repeal or alter fundamental and essential conditions of the Treaty and associated legislation.'* This means that the unalterable nature of the Treaty has been acknowledged by the principal law officer of the Crown in Scotland.

69. That In McCormick v Lord Advocate 1953 SC 396 Lord President Cooper stated *'Further, the Treaty and the associated legislation, by which the Parliament of Great Britain was brought into being as the successor of the separate Parliaments of Scotland and England, contain some clauses which expressly reserve to the Parliament of Great Britain powers of subsequent modification, and other clauses which either contain no such power or emphatically exclude*

subsequent alteration by declarations that the provisions shall be fundamental and unalterable in all time coming, or declarations of a like effect.' (as quoted in Hansard 27 Jul 1999, Column 1422).

70. That Francis Jacobs, Professor of European Law, University of London, wrote, in his *'The Sovereignty of Law: The European Way'* (Hamlyn Lectures 2006, Cambridge University Press, 2007, p. 7): *'Legally, it is difficult, if not impossible, to identify today a state in which a "sovereign" legislature is not subject to legal limitations on the exercise of its powers. Moreover, sovereignty is incompatible, both internationally and internally, with another concept which also has a lengthy history, but which today is widely regarded as a paramount value ... The rule of law cannot coexist with traditional conceptions of sovereignty.'*

71. That Lord Bingham wrote in *'The Rule of Law'* (6th David Williams Annual Lecture, Centre for Public Law, Cambridge University, 2006, p. 29): *'...the existing principle of the rule of law requires compliance by the state with its obligations under international law...'*

72. That international treaties can certainly limit the freedom of action of a state. In the Wimbledon Case of 1923 (case of the SS Wimbledon, Permanent Court of International Justice, 17/8/1923), before the Vienna Convention on the Law of Treaties of 1969 came into force, and in which the UK was an applicant, the Permanent Court of International Justice (or World Court) ruled that under the Treaty of Versailles of 1919 *'Germany has to submït to an important limitation of the exercise of the sovereign rights'* and that ***'No doubt any convention*** **[treaty]** ***creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way'*** [my emphasis] and that *'In any case a neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace.'* Note that the court referred in its judgment to treaties concluded before the court itself was established (1922), such as a treaty of 1888 concerning the Suez Canal, and note also that the Wimbledon Case concerned a treaty (the Treaty of Versailles of 1919) which was agreed before the court was established. One of the judges in the case was Robert Finlay, formerly Attorney-General and Lord Chancellor from 1916 to 1919. Note, in this context, the words of Lord Denning, Master of the Rolls, in Laker Airway Ltd v Department of Trade [1976] EWCA Civ 10: *'The one thing that remained was for the President* [of the USA] *to sign the U.S.A. permit: but this was little more than a formality, seeing that the President was under a treaty obligation to sign it "without undue delay".'* Thus, the President of the USA was personally bound, by virtue of his office, by an international treaty and was held to be so by the second highest court in the UK. Thus, the second highest court in the UK has ruled that an international treaty can be binding domestically in the sense that it obliges the government to act in a certain way or to refrain from acting in a certain way in the domestic sphere.

73. That, on this basis, the Treaty of Union 1707, to the extent that it is a treaty governed by international law, is enforceable in the domestic courts and that, if it is not such a treaty, it is enforceable in the domestic courts because it is the foundational constitutional document of the state of Great Britain and its successor states and was clearly intended to confer rights upon individuals, and it must be enforceable on this basis.

74. That for the union of England and Scotland to take place, there had to be an agreement between the two countries. The order of events was as follow (as per the 'judgment' of Lord Nicholls of Birkenhead):

- On 22/7/1706 commissioners for England and commissioners for Scotland agreed a series of articles.
- On 16/1/1707 the Act of the Scottish Parliament ratifying the articles (with minor amendments) received the royal assent, subject to the articles being ratified in a similar manner in England; that is, ratification by the English Parliament followed by the royal assent.
- On 6/3/1707 the Act of the English Parliament ratifying the articles received the royal assent.
- As specified, the union took place on 1/5/1707.

75. That the union happened on 1/5/1707. But which document or documents form the basis of the union? Lord Nicholls of Birkenhead said in his 'judgment': *'Thus, the terms on which union took place are to be found exclusively, not in a treaty as that expression is normally understood today, but in enabling legislation enacted separately by the two countries before they became `for ever . . . united into one kingdom' (article 1).'* But this is misleading to the extent that it implies that it is the Acts of the two Parliaments that constitute the agreement. They do not. The Acts ratify the agreement; they are not themselves the agreement, even though they repeat the terms of the agreement verbatim. The agreement is in the articles agreed on 22/7/1706. An agreement and the ratification of that agreement are separate things. Ratification of an agreement is not an agreement; it is ratification of an agreement. The Act of the Scottish Parliament does not constitute an agreement; the Act of the English Parliament does not constitute an agreement. The Acts taken together constitute ratification of an agreement made on 22/7/1706. Did the representatives of the two countries reach an agreement on 22/7/1706? Yes, therefore that is the agreement. It was an agreement between two countries, which means that it is a treaty. As with all treaties, the treaty had to be ratified by the respective governments of the countries. Of course, the agreement was not binding until ratified by both parties but it is the agreement which was agreed and it is the agreement which was then ratified. It is the agreement which is the agreement which, when ratified, founded the new state of Great Britain and the Parliament of that new state of Great Britain. **The Union with England Act 1707 states: *'Act Ratifying and Approving the Treaty of Union of the Two Kingdoms of Scotland and England'*. This makes it clear that there was a Treaty and the Act ratified that Treaty; the Act was not the Treaty. The Union with Scotland Act 1706 states: *'An Act for an Union of the Two Kingdoms of England and Scotland'*, but, here's the rub, the Parliament of England had no power to unite the two countries, it could only ratify an agreement to unite the two countries. This means that the words in the English Act also mean that the Act ratifies and approves the treaty, rather than puts into effect a union by itself and on its own authority.**

76. Let's illustrate this. Say you have a treaty agreed by the representatives of eight countries. The treaty must be ratified by the governments of all eight countries. It is so ratified. But the treaty is not the eight documents that signify the ratification by the eight governments, even if those documents repeat the terms of the agreement verbatim; the treaty is the document agreed by the representatives and the date of the treaty is the date of the agreement between those representatives, though, of course, a treaty might not come into force until a later date. If you doubt this, look at the Lisbon Treaty. Precisely this process happened. An agreement was reached between representatives of the relevant states, that agreement was then signed by representatives of the relevant states and the governments of those states then ratified that

agreement. But the treaty is the document agreed and signed by the representatives. If you ask 'Which document is the treaty and when was that document signed?' the answer will be that the document is the one signed in Lisbon by the representatives of the relevant countries on 13/12/2007, which came into force on 1/12/2009.

77. That Article 22 of the Treaty, in relation to an Act to be passed by the Scottish Parliament concerning the method and form of election of the Scottish representative peers, states: *'which Act is hereby declared to be as valid as if it were a part of, and engrossed in, this Treaty'*. In other words, what makes an Act of Parliament valid is its inclusion in the Treaty or, to put it the other way around, an Act of Parliament which is not in the Treaty is invalid (otherwise the words quoted above would be unnecessary). Thus, the Treaty determines the validity of Acts of Parliament relating to the Treaty; it is not the Acts of Parliament which determine the validity of the Treaty. It follows that if the Treaty ceases to exist, the Acts of Parliament relating to the Treaty cease to be valid, and it also follows that since the Acts of Parliament relating to the Treaty (the Union with Scotland Act and the Union with England Act) are still deemed to be valid, this can only be because the Treaty itself is (a) deemed to exist (and therefore binding) and (b) deemed to be valid and (c) determines the validity of related Acts of Parliament. Thus, it is the Treaty that is the governing document, not the two Acts of Parliament referred to - the Treaty and the two Acts of Parliament say so themselves (and the two Acts of Parliament prove that the respective Parliaments agreed on that point).

78. That the document which founded the state of Great Britain and the Parliament of Great Britain was the Treaty of Union, not the Acts of Union, and it is this document which is the key constitutional document which defines and limits* the authority of the Parliament which it established. Take away the document and you have no state of Great Britain (or any successor state) and no Parliament of Great Britain (or any successor Parliament). You are left with Acts of Parliament which ratify a non-existent agreement, which means they ratify nothing.

*See Jackson & Ors v. Her Majesty's Attorney General [2005] UKHL 56 at 106-107 where Lord Hope of Craighead said: *'It has been suggested that some of the provisions of the Acts of Union of 1707 are so fundamental that they lie beyond Parliament's power to legislate. Lord President Cooper in MacCormick v Lord Advocate, 1953 SC 396, 411, 412 reserved his opinion on the question whether the provisions in article XIX of the Treaty of Union which purport to preserve the Court of Session and the laws relating to private right which are administered in Scotland are fundamental law which Parliament is not free to alter. Nevertheless by expressing himself as he did he went further than Dicey, The Law of the Constitution, 10th ed (1959), p 82 was prepared to go when he said simply that it would be rash of Parliament to abolish Scots law courts and assimilate the law of Scotland to that of England. In Gibson v Lord Advocate, 1975 SC 136, 144, Lord Keith too reserved his opinion on this question and as to the justiciability of legislation purporting to abolish the Church of Scotland. In Pringle, Petitioner, 1991 SLT 330, the First Division of the Court of Session again reserved its position on the effect of the Treaty of Union in a case which had been brought to challenge legislation which introduced the community charge in Scotland before it was introduced in England. But even Dicey himself was prepared to recognise that the statesmen of 1707 believed in the possibility of creating an absolutely sovereign legislature which should yet be bound by unalterable laws: Thoughts on the Scottish Union, pp 252-253, quoted by Lord President Cooper in MacCormick at p 412. So here too it may be said that the concept of a Parliament that is absolutely sovereign is not entirely in accord with the reality. Nor should we overlook the fact that one of the guiding principles that were identified by Dicey at p 35 was the universal rule or supremacy throughout the constitution of ordinary law. Owen Dixon, "The Law and Constitution" (1935) 51 LQR 590, 596 was making the same point when he said that **it is of the essence of supremacy of the law that the courts shall disregard as unauthorised and void the acts of any organ of government,***

whether legislative or administrative, which exceed the limits of the power that organ derives from the law [my emphasis]. *In its modern form, now reinforced by the European Convention on Human Rights and the enactment by Parliament of the Human Rights Act 1998, this principle protects the individual from arbitrary government.* ***The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based. The fact that your Lordships have been willing to hear this appeal and to give judgment upon it is another indication that the courts have a part to play in defining the limits of Parliament's legislative sovereignty.*** [my emphasis]'

79. That the British government still holds that the Treaty of Utrecht of 1713, by which Spain ceded Gibraltar to Great Britain, is a binding treaty. See the statement made in the House of Commons on 27 March 2006 by the then Secretary of State for Foreign and Commonwealth Affairs that *'I will note that, in the view of Her Majesty's Government, Gibraltar's right of self-determination is not constrained by the Treaty of Utrecht except in so far as Article X gives Spain the right of refusal should Britain ever renounce Sovereignty. Thus independence would only be an option with Spanish consent.'* If the rights of the United Kingdom with respect to Gibraltar are constrained by the Treaty of Utrecht of 1713, then are not the rights of the United Kingdom with respect to Scotland also constrained by the Treaty of Union of 1707? Either such treaties are binding in law or they are not. Which is it? Gibraltar is undeniably part of Spain geographically but the British government holds that Spain is prevented by the Treaty of Utrecht from interfering in the affairs of Gibraltar in any way, other than as allowed by the Treaty (which is not at all). So why is the British government not similarly constrained from interfering in the affairs of Scotland other than as allowed by the Treaty of Union? Since the UK is subject to EU law, a state which has its own constitution, parliament, laws, court system, bureaucracy, president, flag, anthem, embassies, nascent armed forces, police service (with 'international' arrest warrants) and so on, it is arguable that the UK is not a sovereign state. How can a state be called sovereign when it is subject to foreign-made laws? Spain is in the same position. So, we could argue that the Treaty of Utrecht is not an agreement between sovereign states and is therefore not now a treaty governed by international law. And yet no-one puts forward that argument, as far as I am aware. Clearly, the word 'sovereign' is relative. Interestingly, the Vienna Convention on the Law of Treaties says (Article 1): *'The present Convention applies to treaties between States.'* Article 2 defines terms but the word 'state' is not defined, so clearly the drafters recognized the problem with the word. But I think the point is that if the Treaty of Utrecht can be regarded as a treaty governed by international law, then the Treaty of Union can be regarded as such as well.

80. That, under the Treaty of Union 1707, the Peers of Scotland must be represented in the House of Lords as specified in the Treaty, and it follows that there must therefore, under the Treaty of Union 1707, be a House of Lords for them to sit in. Given this, it is inconsistent with the Treaty that the hereditary peers of Scotland should have the right to sit and vote in the House of Lords, as specified in the Treaty, while the hereditary peers of England should not. This is because Article 23 of the Treaty specifies that the peers of both countries should have the same rights. This cannot be if the equivalent peers of England (the hereditary peers) have no right to sit at all. In short, the Treaty of Union 1707 not only protects the rights of the peers of Scotland, it also protects the rights of the peers of England because it provides that both shall enjoy the same rights. Whatever rights one group of peers enjoys, the other must also enjoy. Saying that A will have the same rights as B amounts to saying that B will have the same rights as A. Whatever your starting point, their rights must be equal.

The Union with England Act 1707 in Scotland and the Union with Scotland Act 1706 in England.

81. That even if the Treaty of Union is ignored entirely, the two Acts of Parliament associated with the Treaty (the Union with England Act 1707 in Scotland and the Union with Scotland Act 1706 in England), which enact the provisions of the Treaty in the law of Scotland and England respectively word for word, are still on the statute book and, to the extent not abrogated, preserve the same rights as those specified in the Treaty.

82. That these Acts are constitutional Acts (as per Thoburn v Sunderland City Council [2002] EWHC 195 (Admin) at 60-64) and thus are not subject to implied repeal by a later Act and can only be repealed by an Act in which an intention to alter the Act is set forth *'expressly on the face of the statute'* (BH & Anor v The Lord Advocate & Anor (Scotland) [2012] UKSC 24 at 30); 'expressly' meaning that the Act being repealed must be named and the intention to repeal the named Act specifically stated.

83. That neither the Heritable Jurisdictions Act 1747, nor the House of Lords Act 1999, nor the Abolition of Feudal Tenure etc. (Scotland) Act 2000 expressly repeal any provision of the Acts of 1706 and 1707 and that they are therefore ineffective to repeal any provision of those Acts.

84. That although the Peerage Act 1963 expressly repealed elements of Article 22 of the Acts of 1706 and 1707, it did not repeal Article 20 of those Acts and it is Article 20 which protects heritable jurisdictions (and baronies and regalities are heritable jurisdictions) *'in the same manner as they are now enjoyed by the Laws of Scotland'*; that is, with the same duties, rights and privileges parcel with them as before the Union, and that one of the rights parcel with baronies was the right to attend Parliament as a peer (member of the Estate of the Nobility), as shown above. Article 20 must protect not just the jurisdiction itself but those rights and privileges which derive from, are attached to or are parcel with the jurisdiction, including those which are inseparable from it, being impartible in law. In other words, it is submitted that the words *'in the same manner'* means 'the jurisdiction and all associated duties, rights and privileges'.

85. That Professor Croft Dickinson, in his introduction to *'The Court Book of the Barony of Carnwath 1523-1542'* states (p. xviii): *'[The barony] is a unity, or unum quid; it has a caput which is inseparable from it and impartible; it is indestructible....' 'Unum quid'* means 'taken and considered as one in law', so that a reference to one part, such as the jurisdiction, is to be taken, in law, to be a reference to all the impartible elements of the thing. Thus, a reference to the jurisdiction must be taken as a reference to the whole barony and all its impartible elements, including the jurisdiction, the title, the caput, the arms and the right to attend Parliament as a noble. See Woolway v Mazars [2015] UKSC 53 for use of the term in a legal context. Thus, to say *'I will buy the caput'* means *'I will buy the caput and all those things that are legally inseparable from it'*, since it is legally impossible to buy the caput without them.

86. That, on this basis, the duties, rights and privileges of barons and lords of regality are preserved by statute (the Union with England Act 1707 in Scotland and the Union with Scotland Act 1706 in England) as they were in 1707.

87. That in 1425 the House of Lords ruled that an Act of Parliament is ineffective to abrogate a peerage unless the peerage is expressly named (*'Complete Peerage'*, Vol. IX, p. 606, n. d). Given that a peerage is defined as *'that dignity of nobility to which attaches the right to sit and vote in the House of Lords'*, it follows that to remove the right to sit and vote is to remove the peerage itself, since this is the essence of the thing (in the same way that if you take away from a policeman his legal authority to perform the office, he ceases to be a policeman, even if he still wears the uniform of one). You are left with a dignity of nobility but certainly not a peerage.

Now, the House of Lords decision of 1425 is still good (and binding) law and it follows, on this basis, that the House of Lords Act 1999 was ineffective in removing the right of hereditary peers to sit and vote in the House of Lords, since no peerages were expressly named therein. The Act of 1399 repealed everything done in the Parliament of 1387-8, including the creation of the Dukedom of Norfolk either by the King in Parliament or by an Act of Parliament. There has been debate as to whether it was the former or the latter, but, either way, the rule or principle expounded is still a good one, being independent of the facts. Not only is the rule or principle independent of the facts, but even if the rule or principle itself had been bad law, it would still, as a House of Lords decision, be binding in law (until 1966 the House of Lords regarded itself as being bound by its own previous decisions and, even today, regards itself as normally bound). See the *'Report of the Speeches of Counsel and of the Lord Chancellor and Lord St. Leonards in moving the resolution upon the Claim of James Earl of Crawford and Balcarres to the Original Dukedom of Montrose created in 1488'*. pp. xv-xx, 296-7, which makes it clear that the Dukedom was created by an Act of Parliament and so would have been abrogated in 1399, but for the principle expounded by the House of Lords that peerages must be expressly named.

88. That this begs the question of whether, if the majority of the members of one of the Houses of Parliament have been unlawfully excluded from the legislative process since 1999, an Act of Parliament passed in their absence is good law. After all, if an Act of Parliament were to be passed through the Commons by the simple expedient of locking the door of the Commons Chamber on the opposition, would that Act be valid - or would it be void *ab initio*? Acts of Parliament start with the words *'Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows…'*, but if, in relation to a certain Act, the 'Lords Spiritual and Temporal' were not 'in this present Parliament assembled' because the majority of them were unlawfully excluded, and they could not therefore give their consent, and the Act was not passed with their authority, can that Act possibly be valid? The answer is clear. No. At the most fundamental level such a thing is a nullity and what is enrolled as an Act of Parliament is quite simply not an Act of Parliament, bearing in mind that, in law, a nullity cannot be made good by any process, 'enrolment' or otherwise.* To say otherwise is quite simply to abandon the rule of law; it would mean that the clerk who enrols an Act of Parliament could enrol a piece of paper which looks like an Act of Parliament and purports to abolish Parliament and make him Prime Minister for life and the courts would enforce that law. The idea is nonsensical.

*In MacFoy v. United Africa Co. Ltd. [1962] A.C. 152, 160, Lord Denning said: *'If an act is void then it is in law a nullity. **It is not only bad, but incurably bad.*** [my emphasis] *There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity.'* Of course, this principle means that any Act of Parliament passed on the basis of a void Act (The House of Lords Act 1999, which unlawfully excludes most of the members of one of the Houses of Parliament) is itself void - unless Parliament is exempt from the rule of law.

89. That in 1999, the 1425 decision of the House of Lords was good and binding in law. Now, if this matter were to be put to the Supreme Court today, it could decide that the 1425 decision was a bad one, but the point is that it was good in 1999 and remains so until declared bad. This means that the hereditary peers were unlawfully excluded from the House of Lords after 1999 and it follows that all Acts of Parliament since the 1999 Act came into effect have been passed by a Parliament which is not a properly constituted Parliament (since most of the members of

one of the Houses of Parliament were unlawfully excluded) and therefore not a Parliament at all. This means that these Acts were void at the time and cannot be made good, even by a subsequent ruling of the Supreme Court, since, in law, a void act is incurably bad.

90. That the enrolled Act rule was stated in Edinburgh & Dalkeith Railway Company v Wauchope [1842] UKHL J12, where it was said: *'All that a Court of Justice can do is to look to the Parliamentary roll: if from that it should appear that a bill has passed both Houses and received the Royal assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through any Court in Scotland, but that due effect will be given to every Act of Parliament, private as well as public, upon what appears to be the proper construction of its existing provisions.'* But note the reference to a bill passing through both Houses of Parliament. Can it truly be said that a bill which 'passes' through one House only because the majority of the members of that House have been unlawfully excluded from the House has, in fact, 'passed' through that House? What does the word 'passed' mean? Well, it necessarily means that it has followed a certain procedure; the proper procedure by which bills pass through a House. If the procedure has not been complied with in some critical respect, then it cannot really be claimed that the bill 'passed' through the House in the way the word is necessarily used and normally understood. While it may be correct to ignore what was said in the House during the passage of the bill, it cannot be correct to ignore a fundamental failure to comply with the proper procedure by which a bill should pass through the House. Thus, the enrolled Act rule, as expounded in 1842, means that the courts are not bound to enforce an Act which has not properly passed through both Houses in terms of procedure. These procedural rules are, of course, part of our constitution*, so that an Act passed otherwise than in accordance with constitutional procedure must, by definition, be unconstitutional - and, being unconstitutional, void.

*Those laws, rules, procedures, customs and precedents which determine the manner in which a state is governed and which protect the fundamental rights of citizens.

91. That in British Railways Board v Pickin [1974] UKHL 1, Lord Morris of Borth-y-Gest said: *'The conclusion which I have reached results, in my view, not only from a settled and sustained line of authority which I see no reason to question and which I should think be endorsed but also from the view that any other conclusion would be constitutionally undesirable and impracticable. It must surely be for Parliament to lay down the procedures which are to be followed before a Bill can become an Act. It must be for Parliament to decide whether its decreed procedures have in fact been followed. It must be for Parliament to lay down and to construe its standing orders and further to decide whether they have been obeyed: it must be for Parliament to decide whether in any particular case to dispense with compliance with such orders. It must be for Parliament to decide whether it is satisfied that an Act should be passed in the form and with the wording set out in the Act. It must be for Parliament to decide what documentary material or testimony it requires and the extent to which Parliamentary privilege should attach. It would be impracticable and undesirable for the High Court of Justice to embark upon an enquiry concerning the effect or the effectiveness of the internal procedures in the High Court of Parliament or an enquiry whether in any particular case those procedures were effectively followed.'* Well OK then, but what if the Parliament he refers to was not actually a properly constituted Parliament (and therefore not a Parliament at all)? You see, everything he said depends on the Parliament he refers to actually being a Parliament. But what if it isn't? Would the courts still refuse to look into the matter? It rather changes the picture, doesn't it? He refers to it being constitutionally undesirable for there to be a clash between Parliament and the courts, but surely, it is even more constitutionally undesirable that the courts should

enforce laws which are not, in fact, proper laws at all? Which take precedence, the delicate sensibilities of judges or the rule of law? Quite.

92. That if the Acts of Union of 1706 and 1707 abrogated the peerages of the small barons (given that they were undoubtedly peers in accordance with the meaning of that word in 1425 and 1707), can they have been effective in doing so, given the 1425 ruling of the House of Lords?

The nature of palatinates (in England) and regalities (in Scotland).

93. That palatinates (or regalities as they are called in Scotland) were originally lawless border regions, such as the Welsh March (Earldom of Chester) and the Scottish March (County Palatine of Durham), granted to a high-ranking noble who was given royal jurisdiction to enable him to maintain law and order in the region. 'Palatine' is derived from the Latin *'palatium'*, that is 'palace', since the palatine lord exercised the same powers as the King in his palace, and he reigned within his lands legally as a *'reguli'* or 'little king', according to Lord Bankton* (*'An Institute of the Laws of Scotland'*, II, III, para. 83), where he refers to a regality as a *'royal dignity'*. *'Hence owners of counties palatine were formerly said to have "jura regalia" in their counties as fully as the king in his palace'* (1 Bl. Comm. 117); that is, they exercised full royal power.

    *Lord Bankton, an institutional writer regarded as authoritative in Scottish courts of law, states, in his *'An Institute of the Laws of Scotland'* (II, III, para. 83), that *'anciently all nobility, in the modern states, proceeded from such fees* [baronies and regalities]*: thus the title of Baron included that of Duke, Marquis and Earl, as well as that of Lord. **All barons were equally intitled, as Lords of Parliament, to sit and vote in it*** [my emphasis]*; the three estates, consisting of the clergy, barons and commissioners of shires. Some persons with greater merit or interest with the sovereign, were invested with higher privileges than barons, by erection of their lands into regalities. This **royal dignity*** [my emphasis] *implied an ample jurisdiction, extending even to capital crimes, and, in some particulars, exclusive of the king's judges ordinary, or sheriffs; so that they were Reguli, or little kings; hence the kingdom was divided into royalty and regality: the Royalty were those parts which were immediately subject to the king's judges; the Regality where the king's judges had no access, unless, on particular occasions, it was indulged to them by special statutes.'*

94. That, in his *'History of Scotland'*, John Hill Burton (1809-1881), Historiographer Royal (1867-1881), stated (Vol. viii, p. 516) that a regality was *'a separate little kingdom carved out of the realm, where a great man was indulged with a gift of supreme* [i.e. royal] *authority'*. William Cruise, in his *'A Treatise on the Origin and Nature of Dignities or Titles of Honour'* (Joseph Butterworth & Son, London, 1823, p. 53) says, speaking of English counties palatine (but the same applies to regalities in Scotland): ***'A county palatine was in every respect a feudal kingdom in itself, but held of a superior lord.'*** A person who rules a kingdom is a king.

95. That Sir George Mackenzie, an institutional writer regarded as authoritative in Scottish courts of law, states that Lords of Regality in Scotland had the same powers as Earls Palatine in England (Nisbet, *'System of Heraldry'*, Vol. II, p. 46) and that he also says (*'Observations'*, 47) that *'A lord of regality is Regulus, a little king, and takes off the people from an immediate dependence on the king'*. Thus a regality was a kingdom and the title 'lord of regality' was a royal title. Note that the caput or head of a regality (the place where the regality court was held) was technically a *'palatium'*, that is a palace or 'seat of royal authority' (Nisbet, *'System of Heraldry'*, Vol. II, Part IV, p. 46).

96. That Alexander Grant, in his *'Franchises North of the Border: Baronies and Regalities in Medieval Scotland'* (The Boydell Press, 2008, p. 39), states: *'Regality powers were superior to*

those traditionally exercised by earls within the old earldoms'. The holders of the ancient earldoms* were, in fact, regarded as kings (as *''reguli' if not 'rex''*, as Professor Croft Dickinson puts it) and they regarded themselves as such. They regarded the King of Scots simply as *primus inter pares* (first among equals).

*The seven ancient earldoms of Scotland were: (1) Angus, now co. Forfar, with Mearns, now co. Kincardine; (2) Athole with Gowry, now the north and east part of Perthshire; (3) Strathearn with Menteith, now the southern part of Perthshire; (4) Fife with Fothreve, both of which now form the county of Fife; (5) Mar with Buchan, now together forming Aberdeenshire and Banffshire; (6) Moray with Ross, now forming Inverness-shire and Ross-shire; and (7) Caithness with Sutherland.

97. That Professor Croft Dickinson, in his introduction to *'The Court Book of the Barony of Carnwath 1523-1542'** states (p. xlii): *'The lord of regality might possess his own chancery for the issue of brieves, which were served in his own name and not in the name of the King; his own mint; his own rights of admiralty, and so forth... **The only right which a full regality did not possess was the right to try treason*** [my emphasis]**.** ' That is, a grant of full rights of regality was a grant of all the rights exercised by the King, excluding only the right to try treason.

    *Described by Sir Malcolm Innes of Edingight, Lord Lyon 1981-2001, as *'the most authoritative account of the formation and functions of baronies in Scotland*' (*'The Scottish Genealogist'*, Vol. 47, June 2000, pp. 35-41).

98. That Alexander Grant, in his *'Franchises North of the Border: Baronies and Regalities in Medieval Scotland'* (The Boydell Press, 2008, p. 12) records that the regality of Sprouston was held with *'the same liberties as the Lord Alexander King of Scotland used to hold his other lands of his kingdom'*; that is, the Lord of the Regality of Sprouston exercised the same powers within his regality as the King did in the rest of the Kingdom.

99. That, in Scotland, the legal term *'in libera regalitate'* ('in free regality' - the words usually used in Crown Charters to create a regality) conferred all the powers exercised by the king, excluding only the right to try treason, but including complete criminal jurisdiction, including the power to try the Four Pleas of the Crown (murder, rape, arson and robbery).

100. That the style *'Palatine'* was used in Scotland in relation to David Stewart, 5th Earl of Strathearn, and his successors, who were called *'Earl Palatine of Strathearn'* following the erection of that earldom into a regality in 1371 (*'Complete Peerage'*, Vol. 12A, pp. 389-391). This shows that Bishops, Earls and Dukes Palatine in England were the equivalent of Lords of Regality in Scotland.

101. That *'St. Andrews as it was and as it is'* (Grierson, James, 3rd Ed., G S Tullis, Cupar, 1838, p.54) states with regard to the powers of the Archbishop of St. Andrews as a lord of regality and count palatine (they were one and the same thing): *'The temporal power and dignity of the archbishop seem to have been no less ample than his ecclesiastical: for, according to Martine, **he was both count palatine and lord of regality*** [my emphasis]. *By the former he is said to have had the power of conferring honours like a sovereign, with a chancellor under him in a temporal capacity; and, by the latter, he had a civil and criminal jurisdiction, both of great extent. He could judge in all civil causes, says the same author, which are competent to the Court of Session, except these four: reductions, suspensions, improbations and redemptions. He could take cognizance of all crimes committed within his regality, such as theft or murder, and upon conviction of the criminal, the escheat of his effects fell to the archbishop. [...] By a tax roll of 1665, if appears that the archbishop had at that time, holding lands of him, one marquis, fifteen earls, three viscounts and five temporal lords, besides many considerable persons of inferior*

rank.' Thus, the Archbishop was, like the Bishop of Durham, a Count Palatine even though he did not hold a temporal earldom.

102. That, in England, the Palatine Counties of Chester and Durham, for example, were created to administer the border areas between England and Wales and England and Scotland respectively. The Palatinate of Durham was ruled by the Bishop of Durham, who was known as the Prince-Bishop of Durham until the passing of The Durham (County Palatine) Act 1836, reflecting the fact that palatine lords were legally sovereign princes of their domains, from which the royal authority was excluded (although the lord of the palatinate still owed allegiance to his sovereign). *'There are two kings in England, namely, the lord king of England wearing a crown in sign of his regality, and the lord bishop of Durham wearing a mitre in place of a crown in sign of his regality in the diocese of Durham'* - William de St. Botolph, 1302, Public Record Office, London, Assize Roll 226, m. 1d. The Duchy of Lancaster still retains certain palatine powers relating to the County Palatine of Lancaster, as does the Duchy of Cornwall (see below).

103. That the Duchess of Cleveland, in her *'The Battle Abbey Roll*' (Vol. I, p. 121) wrote: *'Anthony* [Bek]*, Prince-Bishop of Durham, one of the chief potentates of his age, and "the prowdest Lorde in Christientie."* […] *"No man in all the Realm, except the King, did equal him for habit, behaviour, and military pomp: and he was more versed in State affairs than in ecclesiastical duties; ever assisting the King most powerfully in his wars; having sometimes in Scotland 26 Standard Bearers, and of his ordinary Retinue 140 Knights, so that he was thought to be rather a temporal Prince than a priest or Bishop." - Dugdale. As* ***Prince Palatine*** [my emphasis]*, there was not, in point of fact, a single attribute of sovereignty that did not belong to him. He levied taxes; raised troops; sate in judgment of life and death; coined money; instituted corporations by charter; created Barons, who formed his council or Parliament, and granted fairs and markets. He was Lord High Admiral of the seas or waters within or adjoining the Palatinate; impressed ships for war; and had Vice-Admirals and Courts of Admiralty. Nor was aught wanting of the state and dignity of Royalty. Nobles addressed him only on bended knee; and knights waited bare-headed in his presencechamber. His wealth was enormous, and his expenditure as magnificent as his income.'*

104. That in his *'A Complete Guide to Heraldry'* (1909, p. 604) Arthur Fox-Davies wrote: *'The Bishopric of Durham, until the earlier part of the nineteenth century, was a Palatinate, and in earlier times the Bishops of Durham, who had their own parliament and Barons of the Palatinate, exercised a jurisdiction and regality, limited in extent certainly, but little short in fact or effect of the power of the Crown. If ever any ecclesiastic can be correctly said to have enjoyed temporal power, the Bishops of Durham can be so described. The Prince-Bishops of the Continent had no such attributes of regality vested in themselves as were enjoyed by the Bishops of Durham. These were in truth kings within their bishoprics, and even to the present day though modern geographies and modern social legislation have divided the bishopric into other divisions one still hears the term employed of ''within" or "without" the bishopric. The result of this temporal power enjoyed by the Bishops of Durham is seen in their heraldic achievement. In place of the two crosiers in saltire behind the shield, as used by the other bishops, the Bishops of Durham place a sword and a crosier in saltire behind their shield to signify both their temporal and spiritual jurisdiction. The mitre of the Bishop of Durham is heraldically represented with the rim encircled by a ducal coronet, and it has thereby become usual to speak of the coronetted mitre of the Bishop of Durham; but it should be clearly borne in mind that the coronet formed no part of the actual mitre, and probably no mitre has ever existed in which the rim has been encircled by a coronet. But the Bishops of Durham, by virtue of their temporal status, used a coronet, and by virtue of their ecclesiastical status used a mitre, and the representation of both of these at one and the same time has resulted in the coronet*

being placed to encircle the rim of the mitre. The result has been that, heraldically, they are now always represented as one and the same article.'

105. In a letter to me dated 16/8/2012 Portcullis Pursuivant (College of Arms, London) wrote that, in his view, *'the Bishop of Durham is entitled to a ducal coronet in addition to a mitre by reason of his former secular status as a palatine.'* On this basis, even a former lord palatine is entitled to a ducal coronet.

106. That, according to Burke's *'Dormant and Extinct Peerages'*, the Palatine Earldom of Chester was granted in 1070 to Hugh de Abrincis (d'Avranches), otherwise 'Hugh Lupus' ('Hugh the Wolf') or 'Hugh the Fat', by William the Conqueror *'to hold as freely by the sword as the King himself held England by the crown'*, that is with complete royal jurisdiction.

107. That in his paper *'War, lordship and community in Norhamshire'* (*'Liberties and Identities in the Medieval British Isles'*, The Boydell Press, Woodbridge, 2008, Ed. Michael Prestwich) M. L. Holford states (p. 79): *'Norhamshire, in contrast, was an administrative unit, a 'comitatus', in its own right, with its own sheriff, who also acted as escheator and usually as constable of Norham castle. It had its own coroner and its own liberty court (comitatus), broadly equivalent to the county court elsewhere in England. By at least the fourteenth century, it has its own exchequer and term-days for the payment of rents. Its civil and criminal courts also appear to have been largely self-contained; in the fourteenth century, it was said to be customary that the people of Norhamshire should not have to leave their 'county' to attend an eyre in Durham.'* Thus a palatine lordship or regality equated to a county or *'comitatus'* elsewhere, based on the exercise of a jurisdiction at least equivalent to the sheriff of a county, and was even described as such (a 'county'), and it follows that the lord of a palatinate or regality can therefore correctly be described as a 'count palatine' or 'earl palatine' in the same way as on the continent (the Latin for 'county' and 'earldom' - and an earl was usually an earl of a county - is *'comitatus'*).

108. That the Palatine Earldom of Chester had its own parliament until 1543 and the County Palatine of Durham had its own court system until 1971.

109. That the powers exercised (and still exercised in some ways) by Bishops, Earls and Dukes Palatine in England (e.g. Cornwall and Lancaster) and Lords of Regality in Scotland were unquestionably royal and were at least equal to those exercised by the Princes of the Holy Roman Empire (e.g. Prince Rupert of the Rhine (1619-1682) - of the Palatinate of the Rhine). By any normal usage of the word, therefore, Bishops, Earls and Dukes Palatine in England and Lords of Regality In Scotland were and are princes, if not actually kings. In legal terms, such people were/are certainly princes in accordance with the original meaning of the word; that is, the original Latin word *'princeps'*.

110. That the crown charter of 1632 granting Maryland to Lord Baltimore grants, against the heading ***'Jurisdiction of a Count Palatine'*** [my emphasis]: *'all and singular the like, and as ample rights, jurisdictions, privileges, prerogatives, royalties, liberties, immunities, royall [sic] rights and franchises of what kind soever temporal, as well as by sea, as by land, within the county, iles, iletts, and limits aforesaid; to have, exercise , use and enjoy the same, as amply* ***as any Bishop of Durham, within the Bishoprick, or County Palatine of Durham, in our Kingdome of England*** [my emphasis]*, hath at any time heretofore had, held, used, or enjoyed, or of right ought, or might have had, held, used or enjoyed.'* Note also that the same charter grants, as a count palatine, *'the free and absolute power [...] to conferre favours, rewards and honours, upon such inhabitants within the Province aforesaid, as shall deserve the same, and to invest them, with what titles and dignities soever, as he shall think fit (so as they be not such as are now used in England).'* This conferred the right to create a colonial nobility (Browne, William Hand (1890), *'George Calvert and Cecilius Calvert: Barons Baltimore of Baltimore'*, New York,

Dodd, Mead, and Company, p. 36). On p. 37 it states: *'This charter, as Gardiner has well remarked, provided for a constitutional government according to the ideas of James and of Charles. There was to be **a hereditary feudal monarchy*** [my emphasis]*, surrounded by a body of nobility deriving its rank, dignities and privileges from the prince as the fountain of honour. The law-making power was vested in the prince, not in the people, who could only advise and assent or dissent. The proprietary lacked no single royal power; his title ran 'Cecilius, Absolute Lord of Maryland and Avalon' and the only difference between him and an independent sovereign was the acknowledgment of fealty typified by the tender of the arrows and the reservation of the fifths of gold and silver.'* See also the charter of Charles II in relation to Carolina dated 30/6/1665 which grants similar palatine powers.

111. That, for these reasons, it is clear that Bishops, Earls and Dukes Palatine in England and Lords of Regality in Scotland were equivalent in that they exercised the entire powers of the Crown within their territories, to the exclusion of the King, whose officers had no authority in, and could not even enter, such territories. **In them the King's writ did not run.**

112. That a lord of regality could be given regality powers over a barony which he did not own. Peter McIntyre states (*'An Introduction to Scottish Legal History'*, Stair Society, 1958, p. 378) that *'Like the barony, the regality was an impartible hereditament. The regality was a superior jurisdiction to the barony and the lord of regality might be given regalian rights over a barony which he did not hold. The barons within the regality retained baronial jurisdiction, and the lord of regality exercised his higher regality jurisdiction over the lands of baronies within his regality. Over lands included within the erection and not part of an existing barony the lord of regality had complete shrieval jurisdiction, that is, baronial and regality jurisdiction. Hence lands were frequently erected in liberam baroniam et regalitatem.'*

113. That Lord Bankton states (*'An Institute of the Laws of Scotland'*, II, III, 93) that *'If the Lord of Regality disponed certain of the lands, tho' to be holden of the crown, they were not exempted from the regality jurisdiction, unless it was specially expressed; or the lands conveyed jure regalitatis, whereas such disposition would disjoin the lands from a barony, as is above observed'.*

114. That in 1936 it was written that *'The Regality Court of Holyroodhouse is still active. The Hereditary Keeper of the Palace, the Duke of Hamilton, as Lord of Regality, appoints a bailie and other officials to the Court.'* (*'An Introductory Survey of the Sources and Literature of Scots Law'*, by various authors with an Introduction by the Rt. Hon. Lord Macmillan, Lord of Appeal in Ordinary, Stair Society Publications, Edinburgh, 1936, printed by Robert Maclehose & Co., Vol. I., p. 112-114.) The Office of Hereditary Keeper of the Palace of Holyroodhouse is one of the great Offices of the Royal Household in Scotland and is held by the Duke of Hamilton; it is a Lordship of Regality which is acknowledged to exist today. The current Baillie of Holyroodhouse is John Scott Moncrieff of Murray Beith Murray, Edinburgh.

115. That the Lord Lyon recognized the Lordship and Regality of Garioch on 30/4/2015 (Petition of George David Manking dated 21/8/2014).

116. That, for these reasons, it is clear that Lordships of Regality still exist to this day.

The right to create titles and to grant arms

117. That Bishops, Earls and Dukes Palatine (in England) and Lords of Regality (in Scotland) therefore had the right to create their own barons; that is, effectively, to create franchise baronial jurisdictions out of their own franchise palatine/regality jurisdiction. The Barons of the Earldom of Chester were, in order of seniority: The Baron of Halton, the Baron of Mantalto (Hawarden), the Baron of Wich Maldebeng (Nantwich), the Baron of Malpas, the Baron of Shipbrook, the

Baron of Dunham Massey, the Baron of Kinderton and the Baron of Stockport. The barons of the County Palatine of Durham included the Hyltons of Hylton Castle, the Bulmers of Brancepeth Castle, the Conyers of Sockburne (Sockburn), the Hansards of Evenwood, the Lumleys of Lumley Castle and the Nevilles of Raby Castle.

118. That with regard to Scotland, Professor Croft Dickinson (1897-1963), the leading academic authority on Scottish feudal baronies, states, in his introduction to *'The Court Book of the Barony of Carnwath 1523-1542'* (p. lix): *'Finally, in considering these grants of rights of public justice it is clear that the tenant received them from his lord because his social position entitled him to them, because, in fact, he was already a "baron" as the word was understood in feudal society. He might not hold of the King; he might not hold in liberam baroniam. Nevertheless his jurisdiction was baronial and while bearing Craig's caveat in mind, we are bound to conclude that those tenants who held of an earl or lord and who had a right of furca and fossa were 'barons'. The jurisdiction must be our test, irrespective of whether that jurisdiction was derived from an earl or king.'* See also p. l, n. 2, where he gives examples of baronies held of earls (e.g. Newdosk held of the Earl of Crawford and Cowie held of the Earl of Errol) and of grants by earls *'in liberam baroniam'*, and p. lii, where he states *'It is clear that in certain cases the earls granted lands to be held of them with rights of public justice, and that their "barons" regarded these rights as being derived directly from the earl who, to them, was "regulus" if not "rex".* An example of a barony granted by a Lord of Regality is Muckart which was granted by the Archbishop of St. Andrews (Sir Thomas Innes of Learney, *'Robes of the Feudal Baronage of Scotland'*, P.S.A.S, Vol. LXXIX, p.117, n. 2).

119. That Sir William Betham (1779-1853), Ulster King of Arms, in his *'On Palatine Honours in Ireland'* (The Journal of the British Archaeological Association, 1850, vol. V, p. 200) states: *'These* [palatine] *lords could create tenures and barons, or erect a fee into a barony, which gave the possessor the title of baron and the same rights and jurisdiction, within his barony, as a baron of the kingdom had, that is, jurisdiction of life and limb, or infangethef and outfangethef. They could also create burgage tenures, and incorporate towns, and grant by their charters of incorporation similar privileges to their men as the Crown did.'*

120. **That the power to create barons still exists in Scotland and was <u>exercised into the 1990s</u>, according to Hugh Peskett, Consultant Editor for Scotland, Burke's *'Peerage, Baronetage & Knightage'*, and widely recognized as the world's leading expert on such matters. See Peskett, Hugh; *'Scottish Feudal Baronies'*, *'Peerage, Baronetage & Knightage'*, Burke's, 107th Ed. (also published in *'East Lothian Life'*, Autumn 2003, p. 17) where he wrote: *'There are some rare exceptions* [to baronies being held of the Crown]*, deriving from the ancient power exercised by the earls of the seven ancient earldoms, and by the Lords of the Isles, to erect baronies (a power which they still have and which was exercised into the 1990s)'*. According to Hugh Peskett, the Barony of Skelbo was re-granted by the Countess of Sutherland in 1996. The barony was originally created in 1562 when the Earl of Sutherland granted the relevant lands to Alexander Sutherland of Duffus. For an earlier grant of a barony (Torboll in 1472) by an Earl of Sutherland see *'The Complete Peerage'* (Vol. XII, Part I, p. 547).**

121. That in an E-Mail to me dated 16/5/2008 Hugh Peskett wrote: *'The Barony of Skelbo was one of those where the title had lapsed due to incompetent conveyancing and it had originally been a barony granted by the Sutherlands. The neat way the lawyers devised to get round the problems of the flawed title was to get the Countess of Sutherland to grant a new Charter.'*

122. Note that *'Irish Pedigrees'* (John O'Hart, 5th Ed, vol. II, p. 214 under 'FitzGibbon'), states that John FitzGerald (d 1261), 1st Baron of Desmond (Ireland), *'by virtue of his royal seignory as a Count Palatine'* created his three sons hereditary knights (John FitzGerald was created 'The Knight of Glin' or 'The Black Knight', Maurice FitzGerald was created 'Knight of Kerry' or 'The

Green Knight' and Gilbert FitzGerald/FitzGibbon was created 'The White Knight' (on account of his fair hair). This shows (1) that a baron who held a palatinate was a Count Palatine and (2) that a Count Palatine could create hereditary knights. The last White Knight died in 1611, the last Knight of Glin died in 2011; the Knights of Kerry are still extant.

123. That the *'Correspondence and Report of the Commission appointed to inquire into the Claims of the Maltese Nobility'*, presented to the Houses of Parliament in May 1878 by the Governor of Malta, C. T. van Straubanzee, states:

'20. These islands were granted to the Order [of Malta] as a noble, free and absolute fee (feudum nobile, liberum, et francum) by the Emperor Charles the Fifth as King of Sicily Ultra or of the Island of Sicily, by a patent given at Castelfranco, on the 24th May 1530, under the royal seal of the Kingdom of Sicily Ultra. The Grand Masters were, by that deed, bound to acknowledge, as lords of the feud, the Kings of Sicily and their successors for the time being, to whom they were to pay annually the homage of a falcon, and from whom they were to receive the investiture, according to the enactments of the common law.

21. The Grand Masters who, under the aforesaid dependence, governed these islands as sovereign princes, were twenty-eight in number. We are not aware whether the first twenty Grand Masters from A.D. 1530 to A.D. 1710 ever created new titles of nobility; it appears only that they renewed several grants which had previously become extinct. Grand Master Lascaris, in fact, granted again in 1646 the title of 'Barone di Budack', which had been extinguished. ***The creation of titles of nobility was certainly an indisputable right of the Grand Masters, for on the territory subject to their jurisdiction they exercised all the power inherent in a real and full sovereignty.*** [my emphasis]

22. Since that year (A.D. 1710), under the grandmastership of Fr. D. Raimondo Perellos y Roccafull, the Grand Masters began to create nobles by patent, but conferring only upon them the title of baron. Two patents were granted by the foresaid Grand Master Perellos, one on the 24th December 1879, by which he created the barony of Gomerino, and on the 23rd April 1716, by which the barony of Budack was conferred on Gio Pio De Piro. At a later period, Grand Master Fr. D. Antonio Manoel de Vilhena, who governed the Principality from A.D. 1722 to A.D. 1736, issued four other patents creating four barons, but two of these titles are now extinguished. His Successor Fr. D. Raimondo Despuig conferred two other titles of baron, on the 2nd June 1737 and on the 18th August of the same year. Grand Master Fr. D. Emmanuel Pinto de Foncecca created two titles of count, on the 16th May 1743 and on the 20th January 1745, and lastly, Grand Master Fr. Don Emmanuel de Rohan signed eleven diplomas, from 1775 to 1796, conferring upon several noblemen the titles of baron, count and marquis respectively.'

The above extract shows that the sovereign right to create titles existed where sovereign power was held by a prince as the feudal tenant of a sovereign superior; in this case, the Emperor as King of Sicily. It also shows that such sovereign princes could, *inter allia*, grant the titles of Baron, Count and Marquis. These titles were recognized by the British Government and therefore provide a legal precedent from 1878 with respect to titles granted by other sovereign princes within the jurisdiction of the British crown, since the titles were recognized by the Crown on the advice of the Committee for Privileges of the House of Lords (which is the same process of recognition used for British peerages). **In other words, in 1878 the House of Lords accepted the legal principle that a person exercising sovereign powers has the right to create titles of nobility.** What makes a tenant a sovereign prince is the exercise of the royal power, and Lords of Regality in Scotland exercised **all** the powers of the Crown except the right to try cases of treason. Thus, Lords of Regality are sovereign princes, according to this precedent, and as such can create titles, including the titles of Baron, Count (Earl) and Marquis.

124. With regard to the power of earls and lords of regality to grant arms, it would be nonsensical if an earl or lord of regality could nobilitate (e.g. make a baron) but not grant marks of nobility (i.e. arms) at the same time. Since arms are the means by which nobility is 'known' (*'nobilis'*), it follows that a right to nobilitate must necessarily imply a right to grant arms. A careful reading of the Acts of Parliament of 1592 and 1672 establishing the powers and duties of the Lord Lyon reveals that the 1592 Act conferred the power to visit (i.e. examine) the arms of noblemen, barons and gentlemen, to distinguish (i.e. to grant marks of difference to cadet branches) and to matriculate (i.e. record) arms, to inhibit common sort of people from bearing arms and to impose penalties on those who contravene the Act. There is nothing here that prevents an earl or lord of regality from exercising an existing right to grant arms, which says that arms already granted by such people before that date were not valid or which says that such a right cannot be exercised in the future. The 1672 Act provides that everyone who uses arms should submit an account of their arms with evidence confirming their right to the arms, gives the Lord Lyon the power to grant arms to virtuous and welldeserving people (but this does not necessarily exclude others from doing the same), to furnish extracts of registered arms (i.e. provide official copies of entries in the register) and to impose or remit penalties for the unauthorised use of arms (but this does not means that arms authorised by others are unlawful). The Act also says that the Lyon's register will be the true and unrepealable rule of all arms and bearings in Scotland but this does not of itself prevent arms granted otherwise than by the Lord Lyon from being recorded in the register. In other words, there is nothing in either of these Acts which gives the Lord Lyon the exclusive right to grant arms or which deprives those who had that right from exercising it in the future. It is true that Sir Thomas Innes of Learney in his *'Scots Heraldry'* (2nd ed., p. 83) quotes the case of Macdonell v Macdonald (1826) to the effect that *'a person cannot create arms unto himself'* in support of his assertion that the *'the granting of arms is part of the Royal Prerogative committed to the Kings of Arms'* but the fact that a person cannot assume arms does not exclude an earl or lord of regality from granting arms. Of course, within regalities the royal prerogative was exercised by the Lord of Regality, so it follows that within regalities it was the Lord of Regality who exercised the prerogative of granting arms; in fact, to the exclusion of the King.

125. Sir Thomas Innes of Learney, Lord Lyon 1945-1969, says in his *'The Robes of the Feudal Baronage of Scotland'* (P.S.A.S, Vol. LXXIX, p.117, n. 2) that in Scotland *'the Crown was not the "sole" Fountain of Honour'*.

Rights of admiralty

126. That right of regality in Scotland included, along with rights of chancery and other rights, rights of admiralty (Croft Dickinson, *'The Court Book of the Barony of Carnwath 1523-1542'*, p. xlii), where appropriate, and that these rights were protected by article 19 of the Act of Union of 1707 which states *'that the Heritable Rights of Admiralty and Vice-Admiralties in Scotland be reserved to the respective Proprietors as Rights of Property, subject nevertheless, as to the manner of Exercising such Heritable Rights to such Regulations and Alterations as shall be thought proper to be made by the Parliament of Great Britain'.* Lords of Regality would therefore also have been Lords Admiral in the Admiralty of Scotland, if their lands were coastal (which Mordington is, given that it is bounded by the River Whitadder and that there is no bridge in Scotland below the barony before the open sea), and the title of Lord Admiral survived the Heritable Jurisdictions Act of 1747 in the same way that the title of Hereditary Sheriff, as recognised by the Lord Lyon (e.g. Argyll, Bute, Wigtown), and Lord of Regality, also survived that Act; that is, on the basis that, according to Senior Counsel, the Act must be construed by reference to its purpose and was an Act to remove jurisdictions, not titles. Note also that s.10 Public Offices (Scotland) Act 1817 confirmed that the title Vice-Admiral of

Scotland still existed at that date. See also Sacheverell, William, *'An Account of the Isle of Man*', Manx Society, 1859, Essay III, where it states *'[The Lord of Man's] right of Admiralty was likewise asserted in this assembly [the Manx Parliament], as wrecks, royal fish, &c., are his by his regality.'* For use of the title 'Lord Admiral' by a Lord of Regality see Grierson, James, *'St. Andrews as it was and as it is'*, 3rd Ed., Cupar, 1838, p. 56 where it says *'The power and privilege of admiralty was also among the rights of the see, and the archbishop was lord admiral in all places within the bounds of his own regality.'* Since the Archbishop was lord admiral he was entitled to describe himself as 'Lord Admiral' and the admiralty within which he was a Lord Admiral was the Admiralty of Scotland; hence he was a Lord Admiral in the Admiralty of Scotland.

Duties on wine, clothes and other items purchased for personal use/consumption

127. That Earls and barons were exempt from duties on wine, clothes and other furnishings in 1707 and this right is protected by Article 20 of the Treaty of Union and the Acts of Union 1706/7 on the basis that these Acts are constitutional Acts not subject to implied repeal.

128. That *'The Records of the Parliaments of Scotland to 1707, K.M. Brown et al eds (St Andrews, 2007-2016)'*, date accessed: 24 July 2016, [1597/11/29][1] states: *'All merchandise brought within this realm should pay custom - Our sovereign lord and estates of this present parliament ratify, approve and confirm the act made at Dundee, 13 May the year of God 1597 regarding our sovereign lord's customs, of the which the tenor follows: Forasmuch as it is understood to the king's majesty, his nobility, council and estates presently convened that the subjects of all foreign nations which bring and transport one kind of cloth or other wares or merchandise from any foreign country to their own native country have been in use and yet still continue in the payment of certain custom or other exaction thereof, chiefly at the time of their arrival and incoming within the same, and almost none or few of the subjects of any realm exempt therefrom (the subjects of the country only excepted), who, by reason of an alleged previous immunity, claim the privilege of exemption, albeit it cannot be denied that his majesty is a free prince of a sovereign power, having as great liberties and prerogatives by the laws of this realm and privilege of his crown as any other king, prince or potentate whatsoever, and therefore ought to have the same custom and exaction for maintenance of his princely estate of all cloth and other wares and merchandise to be brought within this realm by his highness's subjects at all times thereafter. For the which purpose his majesty, with advice of his said nobility, council and estates, has thought fit, concluded and ordained that all cloth and other merchandise whatsoever to be brought within this realm from all foreign nations shall pay the custom following at the time of their arrival and entry therein in all time coming, that is to say 12d of every pound's worth of all sorts of the said wares or merchandise. And to this effect, his highness and his said nobility, council and estates give full power and commission to the lords auditors of his exchequer and others of his nobility and council to the number always of 11 persons at the least to set down the A. B. C. of the custom of all cloth and other wares and merchandise which shall be brought and enter within this realm yearly hereafter; with power likewise to them to set price upon the said wares, according to the which the customs officers to be appointed by his majesty to that effect shall uplift custom thereof and to make all other ordinances necessary for the ease of the merchants and surety of his highness's custom in the execution of the premises, and also of such other goods to be transported out of this realm as is not as yet expressed in the A. B. C. already made;* ***providing this act be not extended to earls, lords, barons and freeholders, but it shall be permissible to them to send their goods beyond sea for their own particular use and also it shall be permissible to them to bring within this realm wine, clothes and other furnishings for their own particular use and in no way to make merchandise thereof according to the laws and liberties granted to them of before.*** [my

emphasis] *The which act above-written our sovereign lord and estates foresaid decree and declare to stand as a law in all time coming.'*

129. That *'The Records of the Parliaments of Scotland to 1707, K.M. Brown et al eds (St Andrews, 2007-2016)'*, date accessed: 19 July 2016, [1703/5/200][1] states: *'Act allowing the importation of wines and other foreign liquors - Our sovereign lady, with advice and consent of the estates of parliament, statutes and declares that it shall be lawful from and after the date hereof to import into this kingdom all sorts of wines and other foreign liquors, any former act or statute in the contrary notwithstanding, which her majesty, with advice and consent foresaid, rescinds and declares void and null in so far as they are inconsistent with or contrary to this present act, the said wines or other liquors which shall be imported paying always the former customs, excise and other duties,* ***reserving to the peers and barons of the kingdom the same immunities and freedoms from customs for wines which they had by the 251st act, fifteenth parliament, King James VI*** [my emphasis].*'*

Is Mordington a regality?

130. That the Barony of Mordington has been held in free regality (*'in libera regalitate'*), that is as a palatine lordship, since 24th March 1381-2 when, on the marriage of his son, James (d. before May 1441), to Elizabeth, daughter of the future Robert III, Sir James Douglas received a grant of Mordington and other lands from Robert II (who died in 1390) in free regality, with the Four pleas of the Crown (*'Scots Peerage'*, VI, 350 referring to *Registrum Honoris de Morton**). See also Register of the Great Seal (RMS), II, 993, being a charter of confirmation under the Great Seal dated 9th July 1470 to William Douglas of Morton and Whittingham referring, inter alia, to the *'baroniam de Mordingtoun'* and to grants of Mordington *'in libera regalitate'* by Robert II (meaning that the grants must have been made before he died in 1390) and Robert III.

    **'in feodo et hereditate in liberam regaliam feu regalitatem cum quatuor punctis pertinentibus ad coronam nostram'*; that is, with the four Pleas of the Crown (*Registrum Honoris de Morton*, Vol. II, p. 156).

131. That in E-Mails to me dated 3/9/2012 and 5/9/2012, William (Frank) Bigwood, a well-known Scottish genealogist, confirmed the grant of regality in 1381-2 on the basis of the charters in the *Registrum Honoris de Morton*.

132. That Peter McIntyre, in his *'Introduction to Scottish Legal History'* (Ch. XXVIII, *'The Franchise Courts'*, p. 375) states: *'It required a royal grant to create a baron court; once created it was impartible* and indestructible; only a royal act, the Heritable Jurisdictions Act 1747 (20 Geo. II c.43) could limit the franchise jurisdiction of the baron court.'*

    *That is, indivisible; it could not be broken up. Although the lands could be broken up, the jurisdiction (the barony) could not, unless lands were resigned back into the hands of the King for re-grant to a third party, done by a 'charter by progress', in which case those lands were dissolved from the barony. This contrasts with the situation where the baron granted lands to someone who became his vassal, via a 'feu charter', when the lands remained within the barony and subject to the jurisdiction of the baron court. Certain things were 'impartible' (incapable of being legally divided, both in themselves and from each other); these included the caput, the baronial jurisdiction, the title of baron and any heraldic additaments (See Sir Malcolm Innes of Edingight, *'The Baronage of Scotland: The History of the Law of Succession and the Law of Arms in Relation Thereto'*, The Scottish Genealogist, June 2000). Parcel with these was, of course, the right to attend Parliament as a noble (member of the Estate of the Nobility).

133. That Professor Croft Dickinson makes clear *('The Court Book of the Barony of Carnwath 1523-1542',* p. xxxvii, l*) that a barony, being impartible and indestructible (p. xxxii, xxxvi), retained its separate legal identity (and its separate court) unless united *'in unam et integram baroniam'*, which is why the Barony of Mordington (held in regality) continued to exist as a separate legal entity (and as a regality) even after it had been incorporated into the Regality of Dalkeith. Unlike a personal peerage, a feudal barony which fell into the hands of the Crown did not 'merge with the Crown'.

    **'undoubtedly both the regality and the earldom, like the 'honour' in England, might at times be a 'bundle' of jurisdictions; and if baronies were included therein, each would, being indestructible, retain its own identity, whilst it might even retain its own separate court.'*

134. That by a charter under the Great Seal dated 17th October 1540 (RMS, III, 2213) the Barony of Mordington (held in regality) was incorporated into the Regality of Dalkeith. Although this charter was later declared null by the Court of Session, both the charters of 22nd April 1543 (RMS, III, 2901) and 2nd June 1564 (RMS, IV, 1535) confirm the existence of the Regality of Dalkeith and the incorporation of the Barony of Mordington into that regality.

135. That by a charter under the Great Seal dated 13th December 1581 (RMS, V, 294) the Regality of Dalkeith was incorporated into the Dukedom of Lennox.

136. That by a charter under the Great Seal dated 29th January 1585-6 (RMS, V, 908) the Regality of Dalkeith was dissolved from the Dukedom of Lennox and granted to Archibald Douglas, 8th Earl of Angus. **Note that this proves that a regality that was incorporated into another regality (a Dukedom held in regality in this case) retained its separate identity as a regality. If this had not been the case then it would have been necessary to recreate the Regality of Dalkeith by Crown Charter, as opposed to just detaching that regality from the Dukedom of Lennox.**

137. That on the death of Archibald Douglas, 8th Earl of Angus, on 4th August 1588 the Regality of Dalkeith devolved upon Sir William Douglas of Lochleven (*'Scots Peerage'*, VI, 371), who succeeded to the Earldom of Morton.

138. That by a charter under the Great Seal dated 23rd August 1634 (RMS, IX, 214; RS1/41 ff. 128v-131v) William Douglas, 6th Earl of Morton, resigned lands within the Barony of Mordington (being the lands of Over Mordington and others) into the hands of the King for re-grant to Sir James Douglas of Mordington, second son of William Douglas, 10th Earl of Angus.

139. That by a charter under the Great Seal dated 13th September 1636 (RMS, IX, 589; C2/55/2, no. 245; RS1/45 ff. 144-146) William Douglas, 6th Earl of Morton, resigned the remaining lands of the Barony of Mordington (being the lands of Nether Mordington, dissolved from the Regality of Dalkeith) into the hands of the King for re-grant to Thomas Ramsay, Minister of the Kirk at Foulden, and Helen Kellie, his spouse, to be held by the said Thomas Ramsay and Helen Kellie, his spouse, *'in libera regalitate'*. **Note that the fact that the petitioner has been recognized as Baron of Mordington means that the Court of the Lord Lyon has determined that the Barony of Mordington (and, necessarily, any right of regality parcel with the barony) passed to Thomas Ramsay and from him to his successors in title, including the petitioner.**

140. That this Regality, which was not a new regality but, in effect, a confirmation of the regality which had existed since 1381-2, was **confirmed by a Crown Charter of Resignation and Confirmation in 1856** (C2/256 fo. 97, no. 256 - see page 98, line 23) and has been held by the successors in title ever since, though regality jurisdiction was (purportedly) reduced (in 1747) and then abolished (in 2004). The successors in title to Thomas Ramsay being Douglas of Mordington (1658-1685), Douglas (1685-1773), Douglas Watson (1773-1785), Marshall (1785-1834), Soady (1834-1864), Chirnside (1864-1939), Sutherland (1939-1949), Edwards (1949-

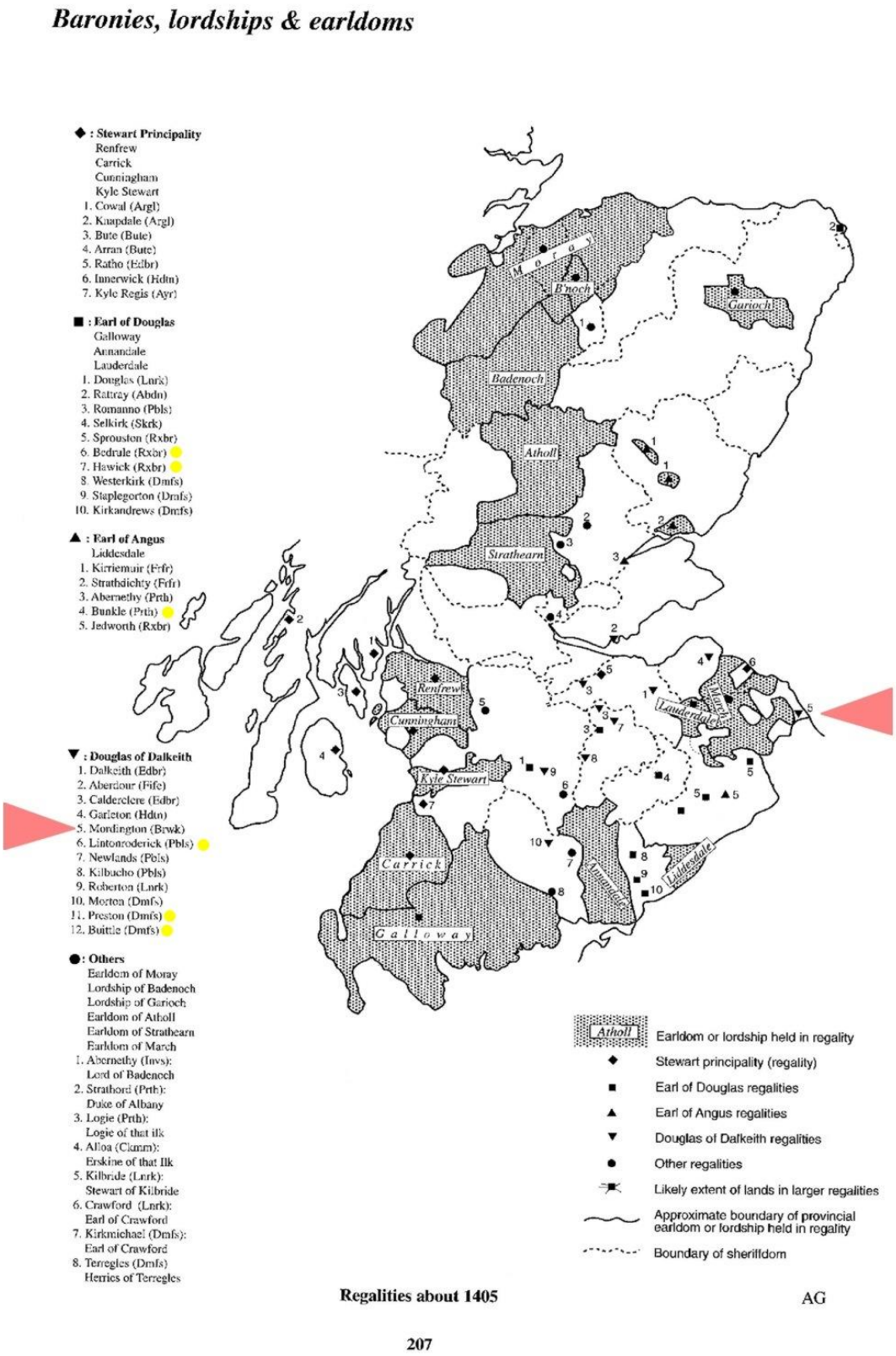
1962), Robertson (1962-1975), Elphinston (1975-1998), when it was acquired jointly by the petitioner and his wife.

141. That, in this context, Claims of Jurisdictions [1748] 5 Brn 750, *'Decisions of The Lords of Council and Session, Collected by James Burnett, Lord Monboddo'* (http://www.bailii.org/scot/cases/ScotCS/1748/Brn050750-0930.html) states: *'It was likewise understood, that, if the whole regality was alienated, the right of regality would go to the purchaser...'* As with an ordinary barony, this must have happened *sub silentio* in the absence of express mention. Thus, the regality created in 1381-2 has passed to each successive owner of the barony even in the absence of express mention. Halliday in his *'Conveyancing Law and Practice'* states (p. 289) that: *'A conveyance of the lands carries the barony and its bundle of rights without express mention. Conversely, a conveyance of part of the lands does not carry the barony or, without, express mention, any additional rights associated with it.'*

142. That the Barony of Mordington (held in regality) was, by an Act of Parliament of 1567 (NAS, PA2/10, II, ff.30r-33v.), protected from any form of revocation for all time (*'On the which day our sovereign lady, with the advice of the three estates of her realm in this present parliament, ratifies, approves and confirms, for her highness and successors, the charter and infeftment made and granted by her majesty to her trusted cousin and counsellor James, earl of Morton, lord Dalkeith etc., and Dame Elizabeth Douglas, his spouse, the longer liver of them, their male heirs contained in the said infeftment and assignees, of all and sundry the lands, lordship and regality of Dalkeith and earldom of Morton, which is specified and contained at length in the said infeftment of the date at Edinburgh, 17 October 1564, and all and sundry points, articles and privileges thereof, and discerns the same to be as good and sufficient to the said James, earl of Morton and Elizabeth, his spouse, the longest liver of them, their male heirs contained therein and assignees, for possessing and enjoying of the said lands, lordship, earldom and regality perpetually in all time coming, as if the same had been given and granted by her majesty after her lawful and perfect age of 25 years complete, with the advice and consent of the three estates of her realm, notwithstanding our sovereign lady's revocation made in this present parliament or to be made in any time hereafter, under which* ***said infeftment shall never be comprehended by any manner of way*** [my emphasis];'). Of course, this Act did not prevent disposal of all or parts of the regality to assignees, given that these are specifically mentioned in the Act.

143. That this Act of Parliament of 1567 protects the Regality of Dalkeith and its constituent elements in the same way that the Act of Parliament of 1469 (RPS, A1469/2) protects the Duchy (commonly called a Dukedom) of Rothesay, which is held by the Prince of Wales.

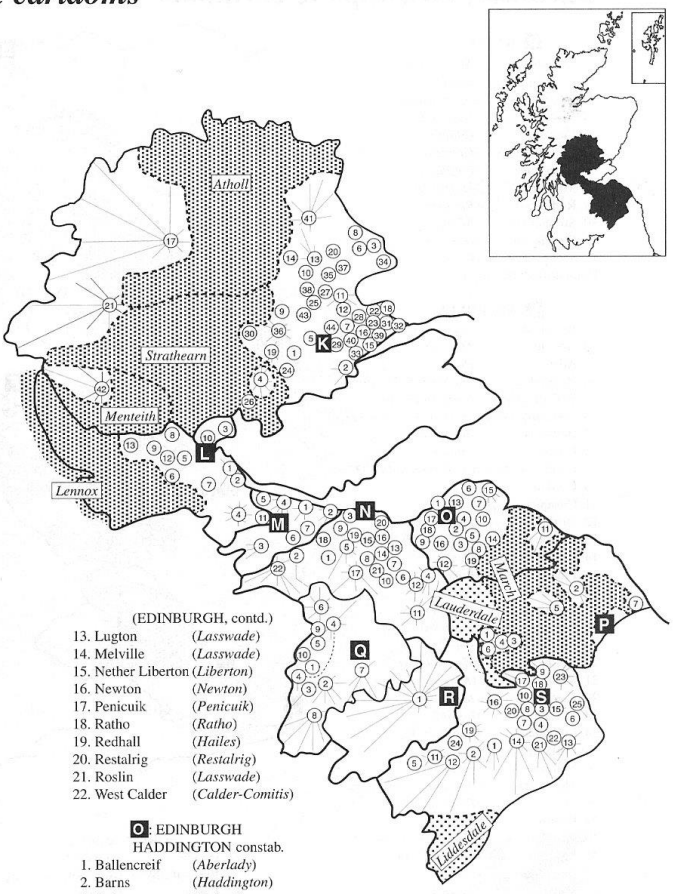
144. That the Regality of Mordington is shown in Edinburgh University's *'An Atlas of Scottish History to 1707'*, 1996, p. 207, *'Regalities about 1405'*, as shown below (see the arrow near Berwick-upon-Tweed in the bottom right-hand corner). Items marked yellow do not seem to match a symbol:



Alexander Grant, *'Franchises North of the Border: Baronies and Regalities in Medieval Scotland'*, The Boydell Press, 2008, p. 15, *'Regalities, earldoms and lordships in early 15th century Scotland'* (that is, 1405):

Edinburgh University, *'An Atlas of Scottish History to 1707'*, 1996, p. 204, *'Baronies, lordships, earldoms'*:

Baronies, lordships & earldoms



K: PERTH
1. Aberdalgie (*Aberdalgie*)
2. Abernethy (*Abernethy*)
3. Alyth (*Alyth*)
4. Auchterarder (*Auchterarder*)
5. Balhousie (*Perth*)
6. Balindoch (*Alyth*)
7. Baltrody (*Kilspindie*)
8. Bamff (*Alyth*)
9. Cairnie (*Moneydie*)
10. Caputh (*Little Dunkeld*)
11. Cargill (*Cargill*)
12. Collace (*Collace*)
13. Clunie (*Clunie*)
14. Easter Cardney (*Dunkeld*)
15. Errol (*Errol*)
16. Fingask (*Kilspindie*)
17. Fortingall (*Fortingall*)
18. Fowlis (*Fowlis Easter*)
19. Gask (*Findogask*)
20. Glasclune (*Lundeiff*)
21. Glen Dochart (*Killin*)
22. Inchmartin (*Inchmartin*)
23. Inchture (*Inchture*)
24. Invermay (*Forteviot*)
25. Kercock (*Kinclaven*)
26. *Kincardine (*Blackford*)
27. Kinclaven (*Kinclaven*)
28. Kinnaird (*Kinnaird*)
29. Kinnoul (*Kinnoul*)
30. Logie (*Monzie*)
31. Longforgan (A) (*Longforgan*)
32. Longforgan (B) (*Longforgan*)
33. Megginch (*Megginch*)
34. Meigle (*Meigle*)
35. Meikleour (*Little Dunkeld*)
36. Methven (*Methven*)
37. Muirton (*Blairgowrie*)
38. Murthly (*Little Dunkeld*)
39. Powgavie (*Inchture*)
40. Rait (*Rait*)
41. Strathardle (*Strathardle*)
42. Strath Gartney (*Aberfoyle*)
43. Strathord (*Auchtergaven*)
44. Tarsappie (*Perth*)

L: STIRLING
1. Airth (*Airth*)
2. Airthbisset (*Airth*)
3. Alva (*Alva*)
4. Callendar (*Falkirk*)
5. Cambusbarron (*St Ninians*)
6. Dundaff (*St Ninians*)
7. Herbertshire (*Dunipace/Herbertshire*)
8. Kincardine (*Kincardine*)
9. Leckie (*St Ninians*)
10. Logie Airthrey (*Logie Atheron*)
11. Manuel (*Falkirk*)
12. Touchfraser (*St Ninians*)
13. West Kerse (*Kippen*)

M: EDINBURGH: LINLITHGOW constab.
1. Abercorn (*Abercorn*)
2. Barnbougle (*Dalmeny/Barnbougle*)
3. Bathgate (*Bathgate*)
4. Carriden (*Carriden*)
5. Kinneil (*Kinneil*)
6. Strathbrock (*Strathbrock*)
7. Winchburgh (*Kirkliston*)

N: EDINBURGH
1. Balerno (*Currie*)
2. Calderclere & Kingscavil (*Calder-Clere+*)
4. Crichton (*Cramond*)
5. Currie (Long Hemmiston) (*Currie*)
6. Dalhousie (*Cockpen/Dalhousie*)
7. Dalkeith (*Lasswade*)
8. Glencorse (*Lasswade*)
9. Gogar (*Gogar*)
10. Gorton (*Lasswade*)
11. Heriot (*Heriot +*)
12. Loquhariot (*Borthwick/Loquhariot*)

(EDINBURGH, contd.)
13. Lugton (*Lasswade*)
14. Melville (*Lasswade*)
15. Nether Liberton (*Liberton*)
16. Newton (*Newton*)
17. Penicuik (*Penicuik*)
18. Ratho (*Ratho*)
19. Redhall (*Hailes*)
20. Restalrig (*Restalrig*)
21. Roslin (*Lasswade*)
22. West Calder (*Calder-Comitis*)

O: EDINBURGH HADDINGTON constab.
1. Ballencreif (*Aberlady*)
2. Barns (*Haddington*)
3. Bolton (*Bolton*)
4. Byres (*Haddington*)
5. Coulston (*Haddington*)
6. Dirleton (*Dirleton*)
7. Drem (*Haddington*)
8. Duncanlaw (*Yester*)
9. Elphinstone (*Tranent*)
10. Garleton (*Athelstanford*)
11. Innerwick (*Innerwick*)
12. Keith (*Keith*)
13. Luffness (*Aberlady*)
14. Morham (*Morham*)
15. North Berwick (*North Berwick*)
16. Pencaitland (*Pencaitland*)
17. Seton (*Tranent*)
18. Tranent (*Tranent*)
19. Yester (*Yester*)

P: BERWICK
1. Boon (*Legerwood*)
2. Bunkle (*Bunkle +*)
3. Gordon (*Gordon*)
4. Huntly (*Cordon*)
5. Langton (*Langton*)
6. Legerwood (*Legerwood*)
7. Mordington (*Mordington*)

Q: PEEBLES
1. Broughton (*Stobo*)
2. Drummelzier (*Stobo*)
3. Glenholm (*Glenholm*)
4. Kilbucho & Newlands (*Kilbucho+*)
5. Kirkurd (*Kirkurd*)
6. Linton Roderick (*Linton Roderick*)
7. Manor (*Manor*)

(PEEBLES, contd.)
8. Oliver Castle (*Stobo*)
9. Romanno (*Newlands*)
10. Skirling (*Skirling*)

R: SELKIRK
1. Selkirk (*Selkirk ++*)

S: ROXBURGH
1. Bedrule (*Bedrule*)
2. Cavers (*Cavers*)
3. Caverton (*Eckford*)
4. Cessford (*Eckford*)
5. Chamberlain Newton (*Hawick*)
6. Clifton (*Morebattle*)
7. Crailing (*Crailing*)
8. Eckford (*Eckford*)
9. Ednam (*Ednam*)
10. Fairnington (*Fairnington*)
11. Hassendean (*Hassendean*)
12. Hawick (*Hawick*)
13. Hownam (*Hownam*)
14. Jedburgh (*Jedburgh ++*)
15. Linton (*Linton*)
16. Longnewton & Maxton (*Maxton*)
17. Makerston (*Makerston*)
18. Maxwell (*Maxwell*)
19. Minto (*Minto*)
20. Nisbet (*Crailling*)
21. Oxnam (*Oxnam*)
22. Plenderleith (*Oxnam*)
23. Sprouston (*Sprouston*)
24. Wilton (*Wilton*)
25. Yetholm (*Yetholm*)

Baronies about 1405, (3): central and south-eastern Scotland AG
(sheriffdoms of Perth, Stirling, Edinburgh, Berwick, Peebles, Selkirk, Roxburgh)

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Some historical context

145. The first mention of Mordington is in a charter (now lost) of King Edgar (c.943-975) of England granting various lands in southern Scotland, including Mordington, to Durham cathedral; this grant was confirmed by William Rufus on 29 August 1095 (Durham University Library Archives & Special Collections, Durham Cathedral Muniments, Miscellaneous Charter 559), when he granted Lothian to Edgar, son of Malcolm III, King of Scots, and further confirmed by Edgar (c. 1074-1107), by then King of Scots, in 1098. However, the original charter of erection of the feudal or territorial Barony of Mordington (Berwickshire), which is now a personal title as a consequence of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (but see above), is lost at a date before 1312 to 1329, in which period the Barony was resigned by Sir Henry de Haliburton (a signatory of the Ragman Roll of 1296 as *'tenaunt le Roi du counte de Berewyk'*) and his spouse Agnes de Morthingtoun (evidently the heiress) to Robert the Bruce for re-grant to Bruce's companion-in-arms, Thomas Randolph, 1st Earl of Moray, who commanded the left wing at the Battle of Bannockburn (1314) and was Regent of Scotland from 1329. It seems likely that the barony was granted to Thomas Randolph after he and Sir James Douglas* (*'The Good Sir James'*) captured Berwick-upon-Tweed in 1318. This was probably done in jest because the Barony was the first land in Scotland that an English army would cross when invading Scotland via the east coast of England and it therefore fell to the Baron to, in effect, defend Scotland from the English. Certainly, there can have been no serious reason to grant such a small territory to someone who had already been granted huge territories in the north (Moray), as well as the Lordship of Man.

*Sir James Douglas was another companion-in-arms of Robert the Bruce and undertook to carry the Bruce's heart into battle against the Infidels after the Bruce's death in 1329. Tarrying in Spain to assist King Alfonso XI in his campaign against the Moors, he was killed in battle in 1330 (possibly at the Battle of Teba). He is said to have thrown Bruce's heart into the fray, saying *'Forward brave heart, as thou wert wont! Douglas will follow thee or die!'* Hence the winged heart emblem and the motto *'Forward!'* of the Douglas family. The Bruce's heart was returned to Scotland and buried at Melrose Abbey. The petitioner is descended from William de Dacre (d. 1399), 5th Lord Dacre, and Joan Douglas, said to have been an illegitimate daughter of William Douglas (c. 1327-1384), 1st Earl of Douglas, nephew of the 'Good Sir James' and inheritor of his estates.

Festival Queen, Karen Oliver, lays a heart-shaped wreath on the resting place of the heart of Robert the Bruce at Melrose Abbey during the Melrose Festival of 2001. The stone is inscribed with the words *"A noble hart may have nane ease gif freedom failye."* (*'A noble heart cannot*

rest when freedom is suppressed.'), a quote from John Barbour's poem *'The Brus'*, written about 1375. The petitioner is descended from Robert the Bruce's aunt, Isabel de Brus (1249-c.1284), who married, as his first wife, Sir John FitzMarmaduke. Their daughter, Mary FitzMarmaduke, married Sir Robert de Lumley, from whom Thomas Lumley, who married Margaret (incorrectly called Elizabeth) Plantagenet, natural daughter of King Edward IV, descended; from whom the Lambtons, Earls of Durham, descend; from whom the Edens, Baronets, Earls of Avon, Earls of Auckland etc. descend (see below).

Robert the Bruce (1274-1329), Thomas Randolph (d 1332), 1st Earl of Moray (and, inter alia, Baron of Mordington), Sir James Douglas (c1286-1330), Isabella, Countess of Buchan (who, as a prisoner of Edward I, spent four years in a cage hanging from the walls of the castle at Berwick-upon-Tweed in revenge for crowning Robert the Bruce) and others (by William Brassey Hole, 1898, frieze in the entrance hall of the Scottish National Portrait Gallery, Edinburgh). The petitioner is descended from Isabella's sister-in-law, Elizabeth Comyn, daughter of Alexander Comyn, Earl of Buchan, who married Gilbert de Umfraville, Earl of Angus (d. 1308).

A lordship of Mordington, held by the family of that name, is referred to in charters dating from the time of Patrick, 5th Earl of Dunbar (1152-1232), which means that the lordship/barony of Mordington is older than the oldest surviving Scottish peerage, the Earldom of Sutherland, which dates from about 1235, and also older than the oldest surviving English peerage, the barony of de Ros, which dates from 1265. In 1335, on the death of John Randolph, 3rd Earl of Moray (who commanded the first Scottish division at the battle of Halidon Hill, near Berwick-upon-Tweed, in 1333), the Barony passed via an heiress (Agnes Randolph or 'Black Agnes of Dunbar') from the Earls of Moray to the Earls of Dunbar or March and then also by marriage (as dowry) to the Douglas family of Dalkeith, later Earls of Morton, and was held by that family from 1372 until 1636, apart from a period of forfeiture between 1581 and 1585 when it was held by the 1st and 2nd Dukes of Lennox and 1585 to 1588 when it was held by Archibald Douglas, 8th Earl of Angus. In 1634 the lands of Over Mordington were detached from the Barony and granted to Sir James Douglas (second son of William Douglas, 10th Earl of Angus), later 1st Lord Mordington (which personal peerage title became extinct in 1755), and in 1636 the Barony, which then consisted solely of the lands of Nether Mordington (with Edrington House, the manor place of Nether Mordington, as the *caput*), was granted to Thomas Ramsay (of the family of Ramsay of Edington, near Chirnside, Berwickshire, apparently a branch of the family of Ramsay, Earls of Dalhousie), Minister of the Kirk at Foulden, Berwickshire, and Helen Kellie, his spouse, to be held in free regality ('*in libera regalitate*'). The Barony was subsequently owned by the families of Douglas of Mordington (1658-1685), Douglas (1685-1773), Douglas Watson (1773-1785), Marshall (1785-1834), Soady (1834-1864), Chirnside (1864-1939), Sutherland (1939-1949), Edwards (1949-1962), Robertson (1962-1975) and Elphinston (1975-1998) until it was acquired jointly by the present owners in 1998 when they purchased Edrington House, the *caput* (legal head) of the barony, and the remaining lands.

146. Agnes Randolph (c. 1312–1369), Countess of Dunbar or March (and Baroness of Mordington in her own right from the death of her brother in 1346), who is buried at Mordington, was known as 'Black Agnes of Dunbar' because of her dark hair. When William de Montagu (d. 1343), Earl of Salisbury, and an ancestor of the petitioner*, besieged Dunbar Castle in 1337-8, 'Black Agnes' commanded the castle in the absence of her husband, Patrick, 9th Earl of Dunbar or March. In response to the Earl's of Salisbury's demand that she surrender the castle she is said to have replied:

"Of Scotland's King I haud my house,
He pays me meat and fee,
And I will keep my gude auld house,
While my house will keep me."

*His daughter, Philippa de Montagu, married Roger Mortimer, 2nd Earl of March, and Roger's grand-daughter, Elizabeth Mortimer (1371-1417), married Sir Henry Percy ('Harry Hotspur') (1364-1403), for which see below. Elizabeth Mortimer was the daughter of Edmund Mortimer, 3rd Earl of March, and Philippa Plantagenet, the only child of Lionel of Antwerp, Duke of Clarence, the second son of King Edward III. Thus Elizabeth Mortimer's brother, Roger Mortimer, 4th Earl of March, became heir presumptive to the throne.

'Black Agnes', Countess of Dunbar (aged 25) at the siege of Dunbar Castle in 1337-8.

147. She is said to have destroyed a siege engine called 'The Sow' by having a huge stone thrown down on it and to have provocatively dusted off the parapets with a handkerchief where English missiles had hit them. When her brother, John Randolph, 3rd Earl of Moray, who had been captured by the English, was brought before the walls, she told the attackers, as a ruse, that she didn't care if they executed him because if they did she would inherit his title and become Countess of Moray. This was untrue because Moray was a male fief. His life was spared. The siege was abandoned by the Earl of Salisbury after 19 weeks.

'Black Agnes' (excerpt)
Attributed to the Earl of Salisbury

'"And do they come?" Black Agnes cried,
"Nor storm, nor midnight stops our foes;
Well then, the battle's chance be tried,
The Thistle shall out-thorn the Rose."
She spake, and started from her bed,
And cased her lovely limbs in mail;
The helmet on her coal-black head,
Sluiced o'er her eyes, an iron veil!
In her fair hand she grasped a spear,
A baldrick o'er her shoulders flung,
While loud the bugle-note of war,
From Dunbar's cavern'd echoes rung.
She makes a stir in tower and trench,
That brawling, boisterous, Scottish wench;
Came I early, came I late.
I found Agnes at the gate.'

'The Thistle and the Rose' ('Black Agnes', Countess of Dunbar and William de Montagu, Earl of Salisbury).

'From the record of Scottish heroes, none can presume to erase her.' - Sir Walter Scott

148. The petitioner is descended from the Earls of Dunbar. Here's one of 24 documented descents:

Gospatric I, 1st Earl of Dunbar (b. About 1040 d. 1074, buried in Norham Church) = Not known
Waltheof, Lord of Allerdale (d. 1138?) = Sigrid
Uchtred, Lord of Galloway (d. 1174) = **Gunnild of Dunbar**
Roland, Lord of Galloway (d. Dec 1200) = Elena de Morville (d. 11 Jun 1217)
Alan, Lord of Galloway (d. 1234) = Not known (a daughter of Roger de Lacy?)
Roger de Quincy, Earl of Winchester (d. 25 Apr 1264) = **Helen of Galloway**
Alan La Zouche, (b. About 1205 d. 8 Oct 1270) = **Helen de Quincy (d. About 20 Aug 1296)**
Sir Roger La Zouche (d. 1285) = Ela Longespée (b. 1244 d. c. 19 July 1276)
Alan La Zouche, 1st Baron La Zouche of Ashby (b. 1267 d. 1313) (He was at the famous siege of Caerlaverock Castle in 1300) = Eleanor de Segrave
Sir Robert de Holland, 1st Baron Holland (b. About 1283 d. 7 Oct 1328) = **Maud La Zouche (b. 1289 d. 31 May 1349)**
Thomas Holland, Earl of Kent (b. 1314 d. 28 Dec 1360). He fought at the Battle of Crécy in command of the vanguard of The Black Prince. In 1348 he was invested as one of the founders and 13th Knight of the Order of the Garter. = Joan Plantagenet 'The Fair Maid of Kent' (b. 29 Sep 1328 d. 8 Aug 1385), grand-daughter of King Edward I.
Thomas Holland, Earl of Kent (b. About 1350 d. 25 Apr 1397) = Alice FitzAlan (b. 1372/1373 d. 17 Mar 1416)
John Beaufort, Earl of Somerset (d. 1410), eldest son of John of Gaunt, Duke of Lancaster (son of King Edward III) = **Margaret Holland**
Edmund Beaufort, Duke of Somerset (b. About 1406 d. 22 May 1455) = Eleanor Beauchamp (b. 1407/8 d. 1466/8)
Sir Robert Spencer of Spencercombe, Devon (d. After 1492) = **Eleanor Beaufort (d. 16 Aug 1501)**
Henry Percy, 5th Earl of Northumberland (b. 13 Jan 1477/8 d. 19 May 1527), a descendant of Sir Henry Percy ('Harry Hotspur') (1364-1403) = **Catherine Spencer (d. Oct 1542)**
Henry Clifford, 1st Earl of Cumberland (b. 1493 d. 1542), son of Henry Clifford, 10th Lord Clifford ('The Shepherd Lord', so called because he was raised as a shepherd) = **Margaret Percy**
John Le Scrope, 8th Baron Scrope of Bolton (d. 22 Jun 1549) = **Catherine Clifford (d. 1598)**
Sir John Constable of Kirby Knowle (b. 1527 d. 1579) = **Margaret Scrope**
Sir Henry Constable of Burton Constable (b. 1557 d. 1607) = Margaret Dormer
Thomas Fairfax, 1st Viscount Fairfax (b. 1574 d. 1636) = **Catherine Constable (b. 1579 d. 1626)**
Sir Thomas Layton of Layton and Saxehowe (b. 1597 d. 1651) = **Mary Fairfax (d. 1636)**
John Eden of Windlestone and West Auckland (b. 1616 d. 1675) = **Catherine Layton (b. 1618 d. About 1686)**
Sir Robert Eden (b. 1644 d. 17 May 1720) = Margaret Lambton (b. 1651 d. 22 Jul 1730)
Sir John Eden (b. About 1680 d. 2 May 1728) = Catherine Shafto (d. 2 Jul 1730)
Sir Robert Eden (b. About 1718 d. 25 Jun 1755) (ancestor of Sir Anthony Eden (1897-1977), 1st Earl of Avon and Prime Minister 1955-57 and also Lawrence of Arabia) = Mary Davison of Beamish (d. 30 Jan 1794)
Thomas Eden (b. 1734 d. 1 May 1805) = Mariana Jones (b. About 1750)
Arthur Eden (b. 9 Aug 1793 d. 1874) = Frances Buncombe-Poulett-Thomson (d. 25 Mar 1877)
Hugh Hammersley (d. 28 Sep 1882) = **Dulcibella Eden (d. 1903)**
Walter Nassau Senior (b. 1850 d. 1933) = **Mabel Barbara Hammersley (b. 1864 d. 1943)**
Oliver Nassau Senior (b. 1901 d. 1992) = Dorothy Gardner Smith (b. 1904 d. 1987), secretary to Rudyard Kipling at Batemans, Burwash, Sussex.
Denys Gordon Milne CBE (b. 1926 d. 2000) = **Pamela Mary Senior (b. 1928)**, god-daughter of Mrs. Rudyard (Carrie) Kipling
Graham Nassau Gordon Senior-Milne (b. 29 Sep 1955), 41st Baron of Mordington

149. A later Baron of Mordington, James Douglas (c. 1516 - 2nd June 1581), 4th Earl of Morton, who was Regent of Scotland during the minority of James VI, was executed in 1581 for his part in the murder of Lord Darnley in 1580. He was executed by a machine called 'The Maiden' which he had apparently designed himself on the basis of a machine he had seen in Halifax (the 'Halifax Gibbet'), little expecting that it would later be used on him.

'The Maiden', forerunner of the French guillotine, in the National Museum of Scotland.

James Douglas (c. 1516 - 2nd June 1581), 4th Earl of Morton, executed by 'The Maiden'. The castle in the background may be Dunbar Castle.

'Complete Peerage' (2nd Ed., vol. IX, p. 291, n. c) states: *"One of the grimmest figures even of the grim race from which he sprang - profligate, merciless, unscrupulous, yet he was not a mere lawless desperado. His conduct of the regency proved that he had the capacity and aims of a statesman" (Hume Brown, Hist. of Scotland). "The 'dark and dangerous' Douglas was a man eminently suited to the time; and yet, from almost every point of view, his character was detestable. He was insatiably greedy... notoriously and shamelessly profligate... He was hard, cruel, unscrupulous. He had as little mercy for man as he had respect for woman. His rivals died like flies… But he was a strong man - a man of no mean political sagacity who went straight to his mark. He had immense patience, unflinching firmness, dog-like tenacity. Though feared and hated, he was implicitly obeyed… He held Scotland in an iron grip. He brought the lawless Borderers to their senses… In spite of his vices, in spite of his crimes, he was the trusted leader of the Congregation… His lewd conversation, his filthy jests, his shameless greed, his rapacious exactions, his unclean life, were forgiven; for he was one of the 'elect,' and do what he chose he could not forfeit 'his birthright'" (Mary Stuart, by John Skelton, 1893). Agnes Strickland in 1858 describes his contemporary portrait at Dalmahoy House as showing "a Judas in complexion as well as character. He wears the Geneva hat, with high sloping crown and narrow brims, resembling a reversed pan or jar; but it neither conceals the villanous* [sic] *contour of his retreating forehead, nor the sinister glance of the small gray* [sic] *eyes peering from under his red shaggy brows. The very twist of his crooked nose is expressive of craft and cruelty; the long upper lip, hollow mouth, and flat square chin, are muffled in a bush of red moustache and beard; but the general outline is most repulsive, and bespeaks the hypocrite, the sensualist, the assassin, and the miser - and all these he was."*

150. Descent of H M The Queen from Sir Peter de Mordington (the line of descent is in bold)

Sir Peter de Mordington, Baron of Mordington	=	Unknown
Sir Henry de Haliburton, Baron of Mordington *jure juxoris* (d. Before 25 Nov 1323). See *'The Scots Peerage'* Vol. 4, p. 331. They surrendered the Barony of Mordington to Robert the Bruce for re-grant to Thomas Randolph, 1st Earl of Moray.	=	**Agnes de Mordington**
Sir Adam de Haliburton	=	Isabella
John Haliburton of Dirleton (d. 1355)	=	Unknown d.o. William de Vaux, Lord of Dirleton
Sir John Haliburton of Dirleton (d. After 1402)	=	Margaret Cameron of Balegarno
Henry Sinclair, 1st Earl of Orkney	=	**Jean Haliburton**
Henry Sinclair, 2nd Earl of Orkney (b. About 1375)	=	Egidia Douglas d.o. Sir William Douglas of Nithsdale
William Sinclair, 3rd Earl of Orkney (resigned 1470) and 1st Earl of Caithness (d. Before 29 Mar 1482)	=	Marjory Sutherland d.o. Alexander Sutherland of Dunbeath
John Stewart of Balvany, Earl of Atholl (b. About 1440 d. 1512)	=	**Eleanor Sinclair**
John Stewart, 3rd Earl of Lennox (d. 1526)	=	**Elizabeth Stewart**
Matthew Stewart, 4th Earl of Lennox (b. 1516 d. 1571)	=	Margaret Douglas (b. 1515 d. 1577/78) d.o. Archibald Douglas, 6th Earl of Angus
Henry Stewart, Lord Darnley (b. 1545 d. 1567)	=	Mary, Queen of Scots (b. 1542 d. 1587)
James VI, King of Scots and I of England (b. 19 Jun 1566 d. 27 Mar 1625)	=	Anne of Denmark (b. 1574 d. 1619)

from whom descends HM Queen Elizabeth II (b. 21 Apr 1926)

The Barons of Mordington

151. According to Black's *'Surnames of Scotland'* the name 'Mordington' is derived from the *'old barony of the same name in Berwickshire, the 'tun' of a Saxon named Mordyn, Mording or Morthing. William de Mordington, the first recorded of the name, appears soon after 1200 as a vassal of the prior of Durham (Raine). William de Morthington held part of the vill of Lamberton, c. 1235, was Chancellor of Scotland in the reign of Alexander II.... He and his son, Sir Peter de Mordingtoun, are frequent witnesses to Coldingham charters (Raine, App.)... The family appears to have ended in an heiress, the afore-mentioned Agnes, daughter of Sir Peter de Mordingtoun, who married Henry de Haliburton.'*

    1. Peter de Mordington (son of William de Mordington, Chancellor of Scotland, who was probably baron), who was succeeded by his son-in-law;
    2. Sir Henry de Haliburton, in right of his wife, Agnes de Mordington (d. After 25 Nov 1323), who resigned the Barony (possibly in 1318) to Robert the Bruce who granted it to;
    3. Thomas Randolph, 1st Earl of Moray and Regent of Scotland (d. 1332), who was succeeded by his son;
    4. Thomas Randolph, 2nd Earl of Moray (k. 1332), dsp, who was succeeded by his brother;
    5. John Randolph, 3rd Earl of Moray (k. 1346), dsp, who was succeeded by his brother-in-law;
    6. Patrick, 9th Earl of Dunbar (d. 1368), in right of his wife, Agnes Randolph, who was succeeded by his nephew or Sir Patrick Dunbar (d. 1356/7) in right of his wife, Isabella Randolph, who was succeeded by his son;
    7. George Dunbar, 10th Earl of Dunbar (d. after 8th Sep 1422), who granted the barony in 1372 to his brother-in-law, who married Agnes Dunbar, sister of George Dunbar;

    8/1. Sir James Douglas of Dalkeith (d. 1420), who granted the barony to his second son (1st Prince Palatine);

    9/2. William Douglas, who was succeeded by his elder brother:

    10/3. Sir James Douglas of Dalkeith (d. before May 1441), who was succeeded by his son;

    11/4. William Douglas of Morton and Whittingham, who resigned the barony in favour of his nephew;

    12/5. James Douglas, 1st Earl of Morton (d. before 22nd October 1493), who was succeeded by his son;

    13/6. James Douglas, 2nd Earl of Morton (d. before September 1515), who was succeeded by his son;

    14/7. James Douglas, 3rd Earl of Morton (d. before 4th November 1550), who was succeeded by his son-in-law;

    15/8. James Douglas, 4th Earl of Morton and Regent of Scotland (executed 2nd June 1581) when the Barony was forfeited and granted to;

    16/9. Esmé Stewart, 8th Earl and 1st Duke of Lennox (d. 1583), who was succeeded by his son;

17/10. Ludovic Stewart, 2nd Duke of Lennox, Duke of Richmond and Earl of Newcastle (d. 1624), who held the barony in 1585 when the forfeiture of the 4th Earl of Morton was reversed and the Barony was granted to the 4th Earl's nephew;

18/11. Archibald Douglas, 8th Earl of Angus (d. 1588), on whose death the barony devolved upon;

19/12. William Douglas, 5th Earl of Morton (d. 1606), who was succeeded by his grandson (his son having been captured by Barbary pirates);

20/13. William Douglas, 6th Earl of Morton, who, on 13th September 1636, resigned the Barony to the King in favour of;

21/14. Thomas Ramsay of Edrington, who built Edrington House, was succeeded by his son in 1653;

22/15. Thomas Ramsay of Edrington, who sold the Barony in 1658 to;

23/16. James Douglas, 3rd Lord Mordington, from whom the Barony passed in 1685 to;

24/17. Joseph Douglas of Edrington, who was succeeded by his nephew in 1773;

25/18. Joseph Douglas Watson of Edrington, who sold the Barony in 1785 to;

26/19. William Marshall of Ingram and of Edrington, who was succeeded by his son in 1792;

27/20. Joseph Marshall of Edrington, who sold the Barony in 1834 to;

28/21. Anthony Dickson of Edrington, who was succeeded by his niece in 1856;

29/22. Mrs Dickson Milliken or Soady of Edrington, who was succeeded by her son in 1864;

30/23. Thomas Eales Soady of Edrington, who sold the Barony in 1864 to;

31/24. Henry Leck of Edrington, who sold the Barony in 1864 to;

32/25. George Chirnside of Edrington, who was succeeded by his trustees in 1898;

33/26. The Trustees of George Chirnside of Edrington, who sold the Barony in 1935 to;

34/27. Edrington & Co., who sold the Barony in 1939 to;

35/28. Munro Sutherland of Edrington, who sold the Barony in 1949 to;

36/29. Lindsay Clark Edwards of Edrington and his son Peter Lindsay Edwards of Edrington, who sold the Barony in 1962 to;

37/30. Janet Elspeth Robertson, Agnes Heatley Robertson and Ethel Greig Robertson of Cawderstanes and Edrington, sisters and founders of the Edrington Group (which owns The Macallan, Highland Park, The Famous Grouse, Cutty Sark and so on), who sold the Barony in 1962 to;

38/31. Hew Airth Grant of Edrington, who sold the Barony in 1963 to;

39/32. Janet Elspeth Robertson, Agnes Heatley Robertson and Ethel Greig Robertson, sisters, of Cawderstanes and Edrington, who sold the Barony in 1975 to;

40/33. Enid Ruth Thomson or Elphinston of Edrington, who sold the Barony in 1998 to;

41/34. Graham Senior-Milne (formerly Milne) of Edrington, 41st Baron of Mordington (and 34th Prince Palatine) and his spouse, Annabel.

The Duchies of Cornwall and Lancaster - Effect of Acts of Parliament on palatinates and regalities

152. That, with regard to the Duchy of Lancaster, it was said: *'Much valuable information concerning the origin and constitution of the Duchy [of Lancaster] will be found in Plowden's Report of the great case of the Duchy of Lancaster, in Michaelmas Term, in the fourth year of the reign of Queen Elizabeth (1 Plowd. 212) ; and the recent cases of Alcock v. Cooke (6 Bingham, 840) and Jewison v. Dyson (9 Meeson and Welsby, 540) may be advantageously consulted with relation to the pre-eminent rights exercised within the Duchy under the several royal grants, and the confirmations of them by Parliament, which provide for its rule and government as an inheritance vested in the person of the Sovereign, but apart from the rest of the royal patrimony. **These cases seem clearly to establish the doctrine that all the prerogatives and privileges of the King belong to him with reference to the lands parcel of the Duchy of Lancaster, in no less a degree than they do with reference to lands which belong to him immediately in right of his Crown.*** [my emphasis]*'* (Hardy, William, *'The Charters of the Duchy of Lancaster'*, London, 1845)

153. That the Right Honourable Thomas Pemberton Leigh, Chancellor of the Duchy of Cornwall, said in May 1855: *"The Duchy Charters have always been construed and treated not merely by the Courts of Judicature but also by the Legislature of the Country as having vested in the Dukes of Cornwall the whole territorial interest and dominion of the Crown in and over the entire County of Cornwall."*

154. That two Duchy of Cornwall charters of King Edward III, dated March 18th 1337 and January 3rd 1338, both state: *'We being willing to show more ample favour in this behalf to the aforesaid Duke for more fully supporting such honour, have granted for us and our heirs that the aforesaid Duke, and the first-begotten sons of him and his heirs, Kings of England, hereditarily to succeed as Dukes of the said place, in our kingdom of England, have for ever returns of all the writs of us and our heirs, and of the summonses of the Exchequer of us and our heirs, and attachments as well of pleas of the Crown as of others whatsoever in all their said lands and tenements and fees in the aforesaid county of Cornwall, **so that no sheriff or other bailiff or minister of us or our heirs enter the same lands or tenements or fees to make executions of the same writs and summonses, or attachments of pleas of the Crown**,* [my emphasis] *or other things aforesaid, or to do any other office there, unless in default of the same Duke and other the Dukes aforesaid of the same place, and their bailiffs and ministers, in their lands, tenements, and fees aforesaid.'* In other words, the King's writ did not run in Cornwall, as with other palatinates and regalities.

155. That, on this basis, it is clear that the Duchies of Cornwall and Lancaster are palatinates (or, rather, that Cornwall and Lancaster are Counties Palatine) in the same manner as other palatinates (such as Durham, Chester and Pembroke) and it follows that they fall to be treated in the same manner in law and vice versa; that is, that those other palatinates and regalities which still exist (which, in Scotland, is all of them) are to be treated the same way in law as the Duchies of Cornwall and Lancaster.

156. That the 1913 *'Opinion on the Duchy of Cornwall by the Law Officers of the Crown'* states: *'1. We are of the opinion that **the same principles which render the provisions of an Act of Parliament inapplicable to the Crown unless the Crown is expressly named, apply also to the Prince of Wales in his capacity as Duke of Cornwall*** [my emphasis]**. This result arises from the peculiar title of the Prince of Wales to the Duchy of Cornwall. In other respects, the Prince of Wales, as being the first subject of the Crown is, like other subjects, bound by statutory instruments.** 2. Taxation is not and cannot be exacted from land; it is exacted from subjects who are taxpayers. For the reason given in our answer to the first question, The Duke of*

Cornwall is not liable to such taxation, but it may be that he will not wish to insist upon his privilege of exemption.'

*See s.227 Planning Act 2008 for an example.

**Magdalen College Case (1615) 11 Cop. Rep. 66 b, 68 b; 1 Bl. Com. 14th ed., 262; Sheffield (Lord) v. Ratcliffe (1615). Hob. 334, 347 (Halsbury, *'The Laws of England'*, Butterworth & Co., London, 1909, vol. 6, p. 409).

157. That Joseph Chitty, in his *'A Treatise on the Law of the Prerogatives of the Crown'* (London, 1820, p. 142-3) wrote: *'The King has an undoubted sovereignty and jurisdiction, which he has immemorially exercised through the medium of the Admiralty Courts, over the British seas, that is, the seas which encompass the four sides of the British Islands.... By implication of law the property in the soil under these public waters is also in the King... As to the soil or fundum maris, there can be no doubt that it may be claimed either by charter or prescription...'*. Thus a palatine lord/lord of regality who had jurisdiction (sovereignty) over an area of sea also had the rights of the crown in the soil under that sea, given that a grant of a palatinate/regality was a grant of all the rights of the crown (except the right to try treason).

158. That Halsbury (*'The Laws of England'*, Butterworth & Co., London, 1909, Vol. 27 p. 164) states: *'The Crown is not bound by the provisions of any statute unless directly or by necessary implication referred to.'* He also says: *'General words do not bar the King of any prerogative, state, right, title or interest which is sole and inseparable to his person (Magdelen College Case [1615] 11 Co. Rep 66b, 74b).'*

159. That if Acts of Parliament do not apply to the Dukes of Cornwall and Lancaster unless they are expressly named, this can only be because Cornwall and Lancaster are Counties Palatine (that is, that the Crown has no authority in them).

160. That it follows that Acts of Parliament do not apply to other Bishops, Earls and Dukes Palatine in England or Lords of Regality in Scotland, other than by express mention or necessary implication, and that the general words of an Act are insufficient to bar their right to any prerogative, state, right, title or interest which is sole and inseparable to their person.

161. That, for this reason, the Heritable Jurisdictions Act 1747, the Peerage Act 1963, the House of Lords Act 1999 and the Abolition of Feudal Tenure etc. (Scotland) Act 2000 do not and did not apply to Lords of Regality as such.

Intention

162. That while it is possible to argue that the intention of the parties to the Treaty of Union, and certainly the Scottish side, was that the 'smaller barons' should not be included within the meaning of the word 'peer' and that subsequent events, such as the compilation of the 'Union Roll' (which listed the peers of Scotland at the time of the union, but which excluded the 'smaller barons' - although Mar, Sutherland and Torphichen were included of course), clearly show this to be the case*, two legal principles prevent the imputation of such an intention; namely, the presumption against taking away rights and the presumption of legality.

*Although the inclusion of certain 'small barons', such as Mar, Sutherland and Torphichen, in the Union Roll means that the meaning of the word is anything but clear. In addition to the ambiguous nature of the word 'peer', we have the very unambiguous wording of Article 20, which expressly preserves baronies and regalities as rights of property *'in the same manner as they are now enjoyed by the Laws of Scotland*. **So, we have a potentially ambiguous word**

‘peer’, which, it could be argued, removes the rights of small barons, against a clear express statement (Article 20) which preserves those rights.

163. That the presumption against taking away rights means that any Act of Parliament (and, by extension, any comparable act of a government, such as a treaty) cannot be taken to abrogate rights unless an intention to do so is expressly stated or necessarily implied (in effect, cannot be avoided). There is no express provision in either the Treaty or the related Acts of Parliament that the smaller barons should not enjoy the same rights as other members of the nobility, nor is such a provision necessarily implied. In fact, the normal meaning of the word ‘peer’ (a dignity which carries the right to attend Parliament as a noble) includes the smaller barons, so not only is there no implication that the smaller barons should not be covered by the word ‘peer’ but the ordinary meaning of that word means that they should be so covered.

164. That the principle of legality (also called ‘the presumption of legality’) means that an intention to do something unlawful is not to be imputed to Parliament unless the words employed are so clear that such an intention cannot be avoided. This principle was affirmed in Secretary of State for the Home Department, Ex Parte Pierson, R. v. [1997] UKHL 37 where Lord Steyn said:

*‘For at least a century it has been "thought to be in the highest degree improbable that Parliament would depart from the general system of law without expressing its intention with irresistible clearness . . .": see the 4th ed. of Maxwell on the Interpretation of Statutes, (1905) at 121, and the 12th ed. of the same book, (1969), at 116. The idea is even older**. In 1855 Sir John Romilly observed that ". . . the general words of the Act are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched . . ."*** [my emphasis]*: Minet v. Leman (1855) 20 Beav. 269, at 278. This observation has been applied in decisions of high authority: National Assistance Board v. Wilkinson [1952] 2 All E.R. 255, at 259, per Lord Goddard, C.J.; Mixnam's Properties Ltd. v. Chertsey U.D.C. [1963] 2 All E.R. 787, at 798, per Diplock L.J. In his Introduction to the Study of the Law of the Constitution; 10th ed., London, (1968), Dicey explained the context in which Parliament legislates as follows (at 414):*

"By every path we come round to the same conclusion, that Parliamentary sovereignty has favoured the rule of law, and that the supremacy of the law of the land both calls forth the exertion of Parliamentary sovereignty, and leads to its being exercised in a spirit of legality."

But it is to Sir Rupert Cross that I turn for the best modern explanation of "the spirit of legality", or what has been called the principle of legality. (The phrase "the principle of legality" I have taken from Halsbury's Laws of England, 4th ed., reissue, vol. 8(2), para. 6.) The passage appears in Cross, Statutory Interpretation, 3rd ed., at 165-166, which has been edited by Professor John Bell and Sir George Engle, Q.C., formerly First Parliamentary Counsel, but it is worth noting that the passage is in all material aspects as drafted by the author: see Cross, Statutory Interpretation, (1976), 142-143. In the 3rd ed. the passage reads as follows:

"Statutes often go into considerable detail, but even so allowance must be made for the fact that they are not enacted in a vacuum. A great deal inevitably remains unsaid. Legislators and drafters assume that the courts will continue to act in accordance with well-recognised rules… Long-standing principles of constitutional and administrative law are likewise taken for granted, or assumed by the courts to have been taken for granted, by Parliament. Examples are the principles that discretionary powers conferred in apparently absolute terms must be exercised reasonably, and that administrative tribunals and other such bodies must act in accordance with the principles of natural justice. One function of the word 'presumption' in the context of

statutory interpretation is to state the result of this legislative reliance (real or assumed) on firmly established legal principles. There is a 'presumption' that mens rea is required in the case of statutory crimes, and a 'presumption' that statutory powers must be exercised reasonably. These presumptions apply although there is no question of linguistic ambiguity in the statutory wording under construction, and they may be described as 'presumptions of general application'… ***These presumptions of general application not only supplement the text, they also operate at a higher level as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts. They operate here as constitutional principles which are not easily displaced by a statutory text….*** [my emphasis]*"'*

165. That in Secretary of State for the Home Department, Ex Parte Simms, Secretary of State for the Home Department, Ex Parte O'Brien, R v. [1999] UKHL 33; [2000] 2 AC 115; [1999] 3 All ER 400; [1999] 3 WLR 328 (8th July, 1999), Lord Hoffman said: *'Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost.* ***Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.*** [my emphasis] *In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.'*

166. That this means that where an ambiguous word is used (and the word 'peer' is ambiguous in the sense that its meaning is not crystal clear - as evidenced by the fact that certain nobles who were not peers in the sense of holding personal peerage titles were treated as peers in that sense by inclusion in the Union Roll), the courts are bound to assume that the word is intended to be subject to the rights of the individual; in other words, that the word 'peer' was intended to have a meaning that would not abrogate the right of the smaller barons to attend Parliament as nobles or, where that right was generally restricted (by the election of representative peers), to be subject only to that general restriction.

167. That the rules of natural justice prevent arbitrary punishment, seizure of property or abrogation of rights (without compensation) and such things are plainly unlawful at a fundamental level. Indeed, the whole purpose of a system of laws is, on the one side, to protect people from such things, while, on the other, to ensure the punishment of wrongdoers.

168. That, on this basis, the abrogation of the right of the smaller barons to be treated as peers would have been unlawful. Further, we can reasonably conclude (1) that the Scottish Parliament knew about the right of the small barons to attend Parliament as nobles (especially since Sir George Mackenzie of Rosehaugh, an institutional writer, confirmed the existence of the right in his *'Science of Heraldry'* (Anderson, Edinburgh, 1680, Chap. XXXI - 'Of Supporters', p. 94) in 1680, some 27 years before the Treaty of Union), and (2), given that knowledge, that had the Scottish Parliament intended to abrogate that right, it would have paid compensation for the loss, on the basis that it is unlawful to abrogate rights without compensation and that the Scottish Parliament cannot be assumed to have intended to do anything unlawful; that is, we must presume, in accordance with the presumption of legality, that the Scottish Parliament did not intend to act unlawfully and it would have paid compensation had it intended to abrogate

the right and the fact that it did not pay compensation must be taken as proof of absence of an intention to abrogate the right.

169. That an intention to abrogate the right of the smaller barons to be treated as peers can be avoided because the ordinary meaning of the word 'peer' includes the smaller barons. Note, in this context, that the word used is 'peer', not 'Lord of Parliament', which, arguably, had a narrower meaning at the time, and we must assume that the word 'peer', as opposed to the term 'Lord of Parliament', was used intentionally (courts often use the argument that 'had Parliament wanted to say x then it would have done so').

170. That the fundamental principle of legality means that because such an intention can be avoided (by using the ordinary meaning of the word 'peer'), **it cannot be imputed**. In other words, it is not for the petitioner to prove that the Treaty of Union and the related Acts of Parliament were intended to include the smaller barons in the word 'peers', it is for the 'other side' to prove that (within the words of the Treaty) there is an unavoidable intention to exclude them by the use of that word.

2004 opinions of Sir Crispin Agnew of Lochnaw QC

171. That, in relation to a proposed petition to the Lord Lyon to be recognized as Baron of Nether Mordington (or some other barony), Sir Crispin Agnew of Lochnaw QC, Rothesay Herald of Arms, prepared draft submissions in October 2003, an opinion in January 2004 and a further opinion in May 2004. Although my instruction to Sir Crispin was to prepare an opinion as to whether I owned *'some form of barony'* (that is, any form of barony), as per my E-Mail to the solicitors dated 20/11/2003, he restricted his opinion (contrary to my instruction) to the question of whether there was a barony arising out of a Regality of Mordington. This relates to the fact that if a regality existed then baronial jurisdiction (a barony) would have been retained when regality jurisdictions were abolished by the Heritable Jurisdictions Act 1747. In other words, the Heritable Jurisdictions Act 1747 left lords of regality with baronial jurisdiction, from which the right to 'life and limb' (impose the death penalty) was removed by the Act, so that lords of regality and barons retained only the right to impose limited fines in respect of certain minor criminal offences.

172. That when Lindsays WS, the solicitors who instructed Sir Crispin on my behalf, sued me (and later bankrupted me in 2014) in relation to Sir Crispin Agnew's bill, which I had declined to pay, they claimed that I had instructed them to assess only whether I was the owner of a barony called 'The Barony of Nether Mordington' and no other name; in other words, that if I was, in fact, the owner of a barony called, say, 'The Barony of Mordington', that I was not interested in that fact. I had been recognized as Baron of Mordington by then, which was rather an awkward thing to explain away - hence the assertion. The Edinburgh Sheriff Court, where Lindsays WS sued me, accepted this nonsensical assertion. Of course, if they had really thought that, it was such a nonsensical and illogical instruction that they should have asked me to confirm it; as in *'Given that we know that there is a Barony of Mordington, are you really sure that you are only interested in finding out whether you own a barony called the Barony of Nether Mordington?'* Of course, that question was never asked. In fact, the Edinburgh Sheriff Court had no jurisdiction to hear the case, since I was then living in England and, under Schedule 8 Civil Jurisdiction and Judgments Act 1982, I should have been sued in that country - a fact which did not seem to bother the Edinburgh Sheriff Court at all. Neither was the court bothered by the fact that Lindsays had claimed in writing on the summons (claim form) that the court did have jurisdiction, that the making of this false statement, even if done recklessly rather than intentionally, amounted to fraud (Derry v Peek [1889] UKHL 1) and that, since my presence in court had therefore been obtained by fraud, the entire proceedings were void for fraud *ab*

initio. Interestingly, when Lindsays WS sought to enforce the judgment of the Edinburgh Sheriff Court in England, the English courts (the Canterbury County Court and the High Court, both the Chancery Division and the Queen's Bench Division) repeatedly refused to even consider my allegation of fraud in spite of the fact that there is clear House of Lords (Supreme Court) authority, binding on them, to the effect that a foreign judgment (and Scotland is a foreign jurisdiction as far as English law is concerned) can be impeached for fraud even if the issue of fraud was investigated and rejected by the foreign court. In other words, if a defendant alleges that a foreign judgment has been obtained by fraud, an English court cannot refuse to consider the allegation. The court might dismiss an allegation once it has considered it, but it cannot dismiss it without considering it at all, which is what they did. In this regard, see O'Brien, John, *'Conflict of Laws'*, 2nd Ed, Cavendish, 1999, pp. 277-281, where the case law is reviewed. This culminated in Owens Bank Ltd v Bracco [1992] AC 443, where the House of Lords upheld the decision of the Court of Appeal in Jet Holdings Inc. v Patel [1990] 1 QB 335, CA, where Staughton LJ said: *'The decisions in Abouloff… and Vandala… show that a foreign judgment cannot be enforced if it was obtained by fraud, even though the allegation of fraud was investigated and rejected by the foreign court.'* Note that in Prest v Petrodel Resources Ltd & Ors [2013] UKSC 34 it was said at 18: *'English law has no general doctrine of this kind. But it has a variety of specific principles which achieve the same result in some cases. One of these principles is that the law defines the incidents of most legal relationships between persons (natural or artificial) on the fundamental assumption that their dealings are honest. The same legal incidents will not necessarily apply if they are not. The principle was stated in its most absolute form by Denning LJ in a famous dictum in Lazarus Estates Ltd v Beasley [1956] 1 QB 702, 712: "No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever…" 'No court in this land'* evidently excludes the Canterbury County Court and the Chancery and Queen's Bench Divisions of the High Court; they do not regard themselves as bound by the decisions of the House of Lords/Supreme Court (at least when dealing with an unrepresented party).

173. That I consider it necessary to consider these submissions and opinions in the context of the present petition.

174. That Sir Crispin's opinion was that a court would be *'likely to hold'* that there no was barony arising out of a regality. Bear in mind, in the context of my instruction to assess whether I owned *'some form of barony'*, that the fact that I was later recognized as Baron of Mordington by the Lord Lyon meant that I was, in fact, the owner of a barony but that Sir Crispin failed to identify that fact. This is our starting point. The key point here is that Sir Crispin knew that there was a Barony of Mordington from the report of Hugh Peskett (an expert on feudal baronies) dated 12/3/2002. He also knew from that report that the Barony was not owned by the Earl of Morton in 1642, since it was not included in a charter of *novodamus* (*'new giving'*, creating a new root of title) of that year. Given that baronies are legally indestructible (a fact which one would have supposed that he must have known as an expert in this area of law), what happened to it? The Barony can only have passed to Sir James Douglas in 1634 or to Thomas Ramsay in 1636, since one part of the barony was disposed of in 1634 and the remainder of the barony was disposed of in 1636. It had to be one or the other. Now, since Hugh Peskett had said in this report that the grant of 1634 was a grant of lands <u>within</u> the Barony and not a grant <u>of</u> the Barony, the Barony must have passed to Thomas Ramsay in 1636. Hugh Peskett incorrectly said that the grant in 1634 was a mere feu charter, but this was wrong; the superiority of the lands passed to Sir James Douglas but it was still a grant of lands <u>within</u> the Barony and not a grant <u>of</u> the Barony (the charter refers to lands *'lying within the Barony of*

Mordington'). It was this logic that the Lord Lyon later accepted and which led him to recognize me as Baron of Mordington; that is, the Lord Lyon agreed that the Barony did not pass to Sir James Douglas in 1634 and that it must therefore have passed to Thomas Ramsay in 1636. In a letter to me dated 19/10/2004 the Lord Lyon wrote *'The 1634 charter clearly did not include the Barony of Mordington.'* The logic is pretty simple if you think about it (although it took me some time to figure it out).

175. That, in any event, Sir Crispin described his opinion (p. 8 of his opinion of January 2004) as *'a preliminary opinion'*, though he still demanded payment for it, invoicing me directly (which is a breach of the rules of professional conduct of the Faculty of Advocates; *'Guide to the Professional Conduct of Advocates'*, 1988, Rule 5.5 states: *'Faculty Services Limited, acting on counsel's behalf, issues a Note of Proposed Fee to the solicitor.'*).

176. That it should be noted that if the Earl of Morton was able, under the relevant charters, to convey the Barony of Mordington to an assignee at all, then he must have had the power to convey the Barony to an assignee with its impartible regality jurisdiction. According to J. F. Riddell, in his *'Inquiry into the Law and Practice in Scottish Peerages'* (Edinburgh, 1862, Vol. I, p. 208-211), a power of assignation was enough to allow the simple conveyance of a personal peerage title to an assignee, as happened with Cardross (*'Complete Peerage'*, 2nd ed., vol. 3, p. 18-19), so would logically have been enough to allow the simple conveyance of a feudal barony held in regality to a purchaser (being an assignee). What I am saying here is that if a person had a power of assignation under a charter, that power could be exercised by means of a simple conveyance and it did not require a crown charter at all. Why would a person need a crown charter to do, or to confirm, something which he already had the power to do under a crown charter? In fact, of course, the Earl of Morton had a statutory power under the Act of Parliament of 1567 (NAS, PA2/10, II, ff.30r-33v.), referred to above, to convey property to an assignee (a 'whom failing' condition seems not to have prevented disposal to an assignee, though his was done with the consent of the heir, usually the eldest son, to whom the property would have passed).

177. That it should be noted, in this context, that the charter of resignation and confirmation of 1856 referred to above (C2/256 fo. 97, no. 256) was a regrant which included a grant of a regality (and hence also a barony) which, if competent, makes earlier grants academic in relation to the question of whether a barony exists today.

178. That Sir Crispin chose to ignore the resignation and confirmation of 1856, even though specifically notified of it in the opinion of Professor Robert Rennie, Glasgow University School of Law, of August 2003 (p. 6) and other documents. Even if there is a question mark over whether the Crown could erect a regality at such a late date, it was surely incumbent on Sir Crispin to consider the matter rather than just ignore it. Note, in this context, that the last barony erected (of new) by the Crown was apparently erected in 1824 (Wikipedia, *'Barons in Scotland'*, https://en.wikipedia.org/wiki/Barons_in_Scotland, accessed 2/4/2017). This might be Anderston, which is a burgh of barony (Wikipedia, *'Anderston'*, https://en.wikipedia.org/wiki/Anderston, accessed 2/4/2017), although the last burgh erected into a burgh of barony was Ardrossan in 1846 (Wikipedia, *'Burgh of barony'*, https://en.wikipedia.org/wiki/Burgh_of_barony, accessed 2//4/2017). A grant of a burgh of barony, which was a grant of various powers of governance and jurisdiction, with the right to hold fairs and so on, was granted to an individual, who I think had to be a baron himself. Logically, if the Crown could erect a burgh of barony in 1846, it could also erect a barony at that date, and if it could erect a barony at that date, it could erect a regality at that date (possibly with limited jurisdiction), and if it could erect a regality in 1846 then, logically, it could erect a regality in 1856. Burghs of barony were only abolished in 1893, so, presumably, the Crown could erect burghs of barony until that date. In short, I am not aware of anything that

prevented the Crown creating a regality in 1856, apart from the Heritable Jurisdictions Act 1747, which prevented the future creation of any jurisdiction contrary to the *'true intent and meaning'* of the Act. This allowed the Crown to create a barony with a jurisdiction limited in accordance with the Act, so it presumably allowed the Crown to create a regality with a jurisdiction limited in accordance with the Act. Thus, while the jurisdiction of the regality would be limited, all other aspects of a regality, such as the *regalia majora* and *regalia minora*, could be retained - in the same was that the Crown still exists even though the monarch can no longer exercise many of the powers monarchs had in the past. Indeed, the monarchy has been stripped of virtually all its powers - but no-one argues that the Crown no longer exists for this reason.

179. That, in broad terms, the basis of Sir Crispin's opinion that there was no barony arising out of a regality was as follows.

180. That the Crown Charter of 1636 did not contain the words *'in libera regalitate'* (*'in free regality'*), the words normally used to erect a regality. This is incorrect; the charter does contain these words (twice in fact, including in the critical *tenendas* clause) and Sir Crispin even quoted the *tenendas* clause of the charter. This means that he quoted the critical words and then said that they weren't there. It is difficult to over-emphasize the enormity of this mistake. When any lawyer is asked to look at a crown charter to see whether it includes a grant of a barony, he looks for the words *'in liberam baroniam'* (*'in free barony'*) because these are the words which were generally used to erect a barony. If they are present then you are almost certainly looking at a grant of a barony. The same applies to grants of regalities and the equivalent words *'in libera regalitate'* (*'in free regality'*). Thus, to 'overlook' these words in a charter is to make a mistake of the most basic and fundamental kind. To refuse to correct such an error when notified of it, which is what he did, is another matter entirely.

181. That the phrase *'cum jure regalitatis'* (*'with jurisdiction of regality'*) used in the Crown Charter of 1636 did not mean *'with jurisdiction of regality'* but only *'exemption from the jurisdiction of a regality'* (the Regality of Dalkeith in this case). This is incorrect; to support this assertion, Sir Crispin quoted the Sir Robert Dixon case from *'Brown's Supplement*, Vol. V, p. 757 (see Sir Crispin's opinion of January 2004, p. 10), but he chose to 'overlook' the statement immediately following the words he quoted, which was: *'On the other side it was said that many undisputed regalities were constituted by the same form of words* ['*cum jure et privilegio regalitatis*'], *particularly the regality of Paisley and many episcopal regalities.*' Further, a crown charter of 1641 (RMS IX, 1191) granted the Regality of Dalkeith to the Earl of Buccleuch using the words *'cum jure regalitatis'* (or very similar words) which was unquestionably a grant of a regality. Further, in the 1636 charter, the phrase *'cum jure regalitatis'* (or a very similar phrase) was used to refer to what the Earl of Morton held (which was unquestionably right of regality) as well as to what was being granted to Thomas Ramsay and it is nonsensical to suggest that a phrase should mean opposite things in the same document. Further, the 1636 charter says that the grantee was to *'enjoy and possess them* [the lands] *in all respects* [my emphasis]*, just as the said earl possesses and enjoys, and his successors and others will possess and enjoy the said lordship and regality of Dalkeith'*; that is, with the same rights, including jurisdiction of regality. If the grantee was to enjoy jurisdiction of regality *'just as the said earl possesses and enjoys'* it, then the words *'cum jure regalitatis'* cannot, in this context, mean anything other than *'with jurisdiction of regality'*. The Latin word *'cum'* means *'with'*, not *'without'*.

182. That a grant of a new regality required the personal signature of the King and the Crown Charter of 1636 was passed by the Barons of the Exchequer. This is incorrect (and a red herring); Sir Crispin 'overlooked' the fact that the grant of 1636 was not a grant of a new regality because, as he well knew from an earlier report by Hugh Peskett (Report by Hugh Peskett dated 12/3/2002, paras. 4 and 5), parts of which he quoted, the Barony of Mordington

(as opposed to the Regality of Dalkeith) had been held in regality since at least the reign of Robert III and specifically before it was incorporated into the Regality of Dalkeith. This means that there was no grant of a new regality in 1636, merely the transfer of an existing regality, which the Barons of the Exchequer undeniably had the power to do (transfer existing subjects).

183. That there was no claim for loss of regality rights in 1747 and this shows that the owners at that time did not consider that they had any basis for such a claim. This is incorrect; claims were made in respect of both Nether Mordington and Over Mordington. Both claims were dismissed by the Court of Session on the grounds that the phrase *'cum jure regalitatis'* or *'cum jure privilegio et jurisdictione libere regalitatis'* inferred no more than an exemption from the jurisdiction of a regality. But, in the case of Over Mordington, the court seems to have ignored the words immediately following; namely, *'capelle et cancellarie infra bondas'*, which translates as *'right of chapel and chancery within the bounds* [above-written]' (charter of 9/11/1732 referred to in NAS CS4/8, 9, 10 and 11). Now the right of advocation and donation of churches was not a right parcel with a regality*, so such a grant cannot possibly be an exemption from a regality; it is an actual grant of the right. And if the *'capelle'* part of *'capelle et cancellarie'* is a grant of a right, the *'cancellerie'* part (meaning *'right of chancery'*, which was a regality right) cannot mean an exemption from someone else's right. This would mean that the phrase *'with A and B'* means *'with A but without B'*, which is nonsensical. These exact words (*'cum jure regalitatis'*) were used in the grant of the Regality of Dalkeith to the Earl of Buccleuch in 1642 (NAS C2/57/1 no. 102, line 28), which was undeniably a grant of a regality, so the court's finding is directly contradicted by this grant; it is quite simply wrong. Since the meaning and effect of these further words was not argued before the court, the court's decision is not a binding precedent in this regard (Kadhim v Housing Benefit Board, Brent [2000] EWCA Civ 344 at 35-39). Note, in this context, that the Crown did not argue that the relevant charter had not been signed by the King, which it would inevitably have done had this fact nullified a grant of regality. Why argue about words in a charter when the whole charter is ineffective in this respect? This strongly suggests that Sir Crispin's argument that such charters had to be signed by the King is wrong. In fact, the King's signature was only required when Crown rights or property were alienated from the Crown, which was not the case in relation to the 1636 charter because all the rights passing to Thomas Ramsay, including the right of regality, had previously been granted away by the Crown; the Crown lost nothing by the grant (Menzies, Allan, *'Conveyancing According to the Laws of Scotland'*, 3rd Ed., Bell & Bradfute, Edinburgh, 1863, p. 827, https://archive.org/stream/conveyancingacc01menzgoog#page/n881/mode/2up, accessed 25/3/2017).

*A grant of the Lordship of Man to Thomas Randolph, Earl of Moray, by a charter dated 20/12/1324 says: *'in liberam regalitatem cum advocationibus ecclesiarium et monasteriorum'* (John Riddell, *'Inquiry into the Law and Practice in Scottish Peerages'*, Edinburgh, 1842, Vol. I, p. 102). This proves that a grant of a regality did not include the advocation of churches because, if it had, the words *'cum advocationibus ecclesiarium et monasteriorum'* would have been superfluous, though grants did sometimes enumerate rights already encompassed by other words. In any event, the word *'cum'* clearly means 'with', regardless of whether the right was already encompassed by other words or not.

184. That, in short, not only was Sir Crispin Agnew's opinion demonstrably wrong in several key respects (including a critical error of fact in relation to the words *'in libera regalitate'*), it was ruled to be wrong (in effect) by a judicial decision of the Lord Lyon as to my ownership of the Barony of Mordington. And not only was the opinion demonstrably wrong, it was not even a proper opinion (being a preliminary opinion). And not only was it demonstrably wrong and not even a proper opinion but it was not even what I had clearly instructed him to produce (an

opinion as to whether I owned *'some form of barony'*). It is important to note that I drew Sir Crispin's attention to the above matters before he produced his second opinion* (I used a highly-qualified researcher to double check all his sources and I asked Sir Crispin to issue a corrected opinion replacing his original opinion, but I merely got a mealy-mouthed further opinion sort of acknowledging that my arguments might have weight) but he declined to correct even his critical and glaring error of fact in relation to the words *'in libera regalitate'*.

*On 30/3/2004 (that is, before Sir Crispin produced his second opinion dated 24/5/2004), I wrote by E-Mail to Mr. Shearer of Lindsays WS pointing out that the lands of Over Mordington were resigned into the hands of the king in 1634 for re-grant to Sir James Douglas. The words *'quas dictus comes cum consensu Roberti dom. De Dalkeith filii sui legit. natu maximi resignavit 22 Aug. 1634'* (*'which the said earl with the consent of Robert, Lord of Dalkeith, his legitimate eldest born son, resigned* [which can only have been into the hands of the king] *on 22 Aug. 1634'*) in the charter of 1634 was a bit of a give-away. I wrote that this must have meant that these lands of Over Mordington were dissolved from the Barony of Mordington at that time, that this meant that after 1634 the Barony of Mordington had consisted solely of the lands of Nether Mordington and this meant that when Nether Mordington was granted to Thomas Ramsay in 1636 he must have acquired the Barony of Mordington at the same time, because, in accordance with Halliday's dictum to the effect that if the entire lands of a barony are sold the barony passes even without express mention ('*Conveyancing Law and Practice*', p. 289), the barony passed *'sub silentio'* even though not mentioned in the 1636 charter. Thus, Lindsays WS and Sir Crispin had the same information available to them at that time as that on which the Lord Lyon later recognized me as Baron of Mordington.

185. That, in the context of the current petition, Sir Crispin Agnew's opinions on the question of a barony arising out of a regality are irrelevant because he only considered the question of whether a new regality had been created in 1636. Sir Crispin was clearly barking up the wrong tree (why he did this in spite of the facts screaming in his face is another question) and I only deal with the matter here to avoid any suggestion that I am trying to exclude unfavourable material.

Conclusion

186. That, for the reasons given above, the petitioner is a peer in the peerage of Scotland (meaning the holder of a title of nobility which, before the House of Lords Act 1999, carried the right to sit and vote in Parliament as a noble, but, from 1707 to 1963, only if elected as a representative peer). In this context, I wish to consider what the opposite finding entails; that is, a finding that the petitioner is not a peer in the peerage of Scotland. Given that the Barony of Mordington was undeniably a peerage, in the sense that the holder originally had the right to sit and vote in Parliament as a noble, to rule that the holder no longer has that right (subject to the above limitation) would clearly mean that the Committee has found that the right has been removed; that the holders of the Barony had that right but no longer have it. This would be in spite of the fact that:

- There is no express provision in any statute (before 1999) removing the right;
- The right has not been lost by desuetude (non-use);
- The right is protected as a right of property by Article 20 of the Treaty of Union, the founding constitutional document of Great Britain and hence also of the United Kingdom, and by which Parliament is *'unalterably bound'* as per the *'Case for Lord Grey'* (above);

- The right is protected as a right of property by Article 20 of the Union with Scotland Act 1706, a constitutional Act not subject to implied repeal and which has not been expressly repealed in this respect;
- The right is protected as a right of property by Article 20 of the Union with England Act 1707, a constitutional Act not subject to implied repeal and which has not been expressly repealed in this respect;
- The right is protected (after 1707) by a decision of the House of Lords in 1425 (The Norfolk Case) which ruled that a peerage cannot be abrogated by an Act of Parliament unless expressly named;
- The right is protected by an Act of Parliament of 1503, which imposed the Parliamentary duties of a peer (attendance at Parliament as a noble) on the holders of the Barony by statute (that is, the holders were made peers by statute);
- The right is expressly protected from any form of revocation for all time by an Act of Parliament of 1567 which refers to a charter under the Great Seal of 17th October 1564 (a repeat of the charter of 2nd June 1564 (RMS, IV, 1535), *'Scots Peerage'*, Vol. VI, p. 363) in which the Barony is expressly named;
- The right is protected by the presumption against taking away rights, which means that the right can only be removed by express mention or necessary implication;
- The right is protected by the presumption of legality, which means that the right can only be removed by words by which an intention to remove the right is unavoidably expressed (that is, no other meaning is possible);
- That, as a regality, Acts of Parliament do not apply to the Barony other than by express mention or necessary implication;
- That, as a regality, the general words of an Act do not bar the holder *'of any prerogative, state, right, title or interest which is sole and inseparable to his person'*.

Petition

187. And Your Petitioner therefore humbly prays that Your Lordships will be pleased to declare that Your Petitioner has established his possession of the Barony and Regality of Mordington in the Peerage of Scotland and direct that:

- he be entered as such on the Roll of the Peerage;
- he is a Lord Temporal.
- he is entitled to enjoy the privileges of peers and the *jura regalia* (*minora* and *majora*) of a baron and a lord of regality and enjoy all other rights and privileges of a baron and a lord of regality as they were in 1707, including civil and criminal jurisdiction (including repledging), chancery, mint, rights of admiralty (including wrecks and royal fish), the granting of honours, titles and arms, rights in the soil and seabed and so on;
- he is entitled to bear in his arms the additaments appropriate to a peer and Lord of Regality, being a ducal coronet and supporters;

and alternatively:

- he is entitled to vote in the elections of representative peers and to stand for election as a representative peer;

  or

- he is entitled to a writ of summons to sit and vote in the House of Lords;

and further or otherwise as Your Lordships see fit.

15/2/2017

The Hammersley Connection - Relationships between the Eden, Hammersley, Poulett-Thomson and Baring families

(Titles in red are titles granted to or passing to members/descendants of the families via inheritance or marriage - 38 titles, excluding secondary titles, including 17 new peerages, but the Dukedom of Cambridge did not pass to the eldest son of the 2nd Duke. Important offices are in blue.)

Thomas Eden (1734-1805), Deputy Auditor of Greenwich Hospital, of Wimbledon, son of Sir Robert Eden **3rd Bt.** (d 1755)* = Mariana Jones

Eden

Thomas Hammersley (1747-1812), banker to the Prince Regent, of London = Anne Greenwood

Hammersley

John Poulett-Thomson (d 1839), Russia merchant (Thomson, Bonar & Co.), of Waverley Abbey House, Farnham = Charlotte Jacob

Paulet/Poulett

Sir Francis Baring **1st Bt.** (1740-1810), banker (Barings), of the Manor House, Lee, Lewisham = Harriet Herring

Baring (Ashburton)

Arthur (1793-1874), Assistant Comptroller of the Exchequer, of Harrington Hall, Slingsby, Lincolnshire and Cannizaro Park, Wimbledon = Frances Poulett-Thomson (d 1877)

4 boys, 3 girls, inc. **Lt-Gen** John Eden (1789-1864), **Admiral** Henry Eden (1797-1888) and Mary Anne (1785-1865), who married (2), Henry Brougham (1778-1868), **1st Lord Brougham and Vaux**, **Lord Chancellor** (1830-1834).

Charles (1782-1862), banker (Cox & Co.), of 25 Park Crescent, London = Emily Poulett-Thomson

2 boys, 6 girls, inc. Hugh **MP** (1774-1840), who married Marie de Montolieu, **Baroness of St. Hippolyte** (Holy Roman Empire) and Caroline (b 1774), who married **General** Sir Henry Calvert **Bt.**

Emily = Charles Hammersley

Frances (d 1877) = (1) William Baring (1779-1820) = (2) Arthur Eden (1793-1874)

3 boys, 4 girls, inc. Andrew (b 1786), **Director of the Bank of England**, George (1797-1876), one of the founders of modern geology, Charles (1799-1841), **1st Lord Sydenham**, **Governor-General of Canada**, Charlotte, who married Sir Charles Taylor **1st Bt.** (1770-1857), Julia (d 1834), who married **Baron Heinrich von Maltzan** and Sophia (d 1827), who married Wilhelm, **Baron von Biel**

William (1779-1820) of Lulworth Castle, Dorset = Frances Poulett-Thomson (d 1877)

4 boys, 4 girls, inc. Sir Thomas (1772-1848), 2nd Bt. (father of Francis (1796-1866), **1st Lord Northbrook**, **Chancellor of the Exchequer** (father of Thomas (1826-1904), **1st Earl of Northbrook** and **Governor-General of India**)), Henry (1776-1848) (father of the Edward, **1st Lord Revelstoke**, great-great-grandfather of Diana, **Princess of Wales** (mother of Prince William, **Duke of Cambridge**) and Evelyn, **1st Earl Cromer** (father of Evelyn (1903-1973), **1st Lord Howick of Glendale**)) and Alexander (1774-1848), **1st Lord Ashburton** of The Grange, Hampshire.

Diana, Princess of Wales

Related? James Bond by Ian Fleming (see below)

Frederick (1828-1916) of the Palazzo Barbarigo, Venice, and the Villa Eden, Salce. = Caroline Jekyll (1837-1928) (No issue). They created the Garden of Eden, Giudecca, Venice, later home of Princess Aspasia of Greece and Alexandra, Queen of Yugoslavia, now a national monument. He was the author of 'A Garden in Venice' (1903).

Dulcibella (d 1903) = Hugh Hammersley (1819-1882)**

1 boy, 1 girl

1st cousins

The Lion of St.Mark, symbol of Venice.

Hugh (1819-1882), banker (Cox & Co.), of Sun House, Chelsea and Warren House, Kingston-upon-Thames = Dulcibella Eden (d 1903)**

3 boys, 6 girls: Arthur, Hugh, Guy, Margaret, Dora, Mabel, Maud, Beatrice, Sylvia

Julia (1813-1895) = Edward Jekyll, Capt. **Grenadier Guards** (1804-1876), of Bramley Park, Bramley, Surrey (1848-68), and later of Wargrave Hill (now Wargrave Manor), Wargrave.

Caroline (1837-1928) = Frederick Eden 1828-1916)

1st cousins once removed

Elizabeth (1825-1897) = William Baring, Capt. **Coldstream Guards** (1819-1906)

Grenadier Guards cap badge

3 boys, 5 girls, inc. **Maj-Gen** Frederick Hammersley (d 1901) (father of **Maj-Gen** Frederick Hammersley (1858-1923), who commanded the 11th Division at Suvla Bay in 1915) , Cecilia (1819-1890), great-grandmother of Charles Hambro (1930-2002), **Lord Hambro** and James Elphinstone (1953-1994), **18th Lord Elphinstone**, and Catherine (1821-1887), who married Thomas Weguelin **MP** (d 1885), **Governor of the Bank of England**

5 boys, 1 girl, inc. Gertrude Jekyll (1843-1932), the famous gardener, and Col. Sir Herbert Jekyll (1846-1932), father of Barbara (1886-1973), who married , secondly, **Lt. Gen.** Sir Bernard Freyberg VC (1889-1963), **Grenadier Guards**, **1st Lord Freyberg** and **Governor-General of New Zealand**, and Pamela (d 1943), who married Reginald McKenna **MP**, **Home Secretary** and then **Chancellor of the Exchequer**.

William (1819-1906), of Norman Court, West Tytherley, Hants = Elizabeth Hammersley (1825-1897)

Coldstream Guards cap badge

1st cousins

Charlotte Rosa*** = Robert Duncome Shafto **MP**, of Whitworth Hall, Co. Durham (1806-1898)****

2 girls

Rosa Frederica (1854-1927)*** = (1) Frank Arkwright (1848-1893), Capt. **Coldstream Guards**, of Sanderstead Court, Surrey = (2) Col. George FitzGeorge (1843-1907)

1 boy, 1 girl

2 boys

Rosa Baring ('Maud')

(1) 1 boy, 1 girl, including Vera Bate Lombardi (1883-1948)
(2) 2 boys, 1 girl, including Mabel Iris FitzGeorge (1886-1976)

Vera Bate Lombardi, 1909

A 'Vogue' cover (August 1945) of Bridget Bate Tichenor (1917-1990), daughter of Vera Bate Lombardi.

'Rose of roses, bliss of blisses, Rosebud-lips for honey-kisses; East & West & North & South Bear not such a rose as this is.' Lord Tennyson to Rosa Baring

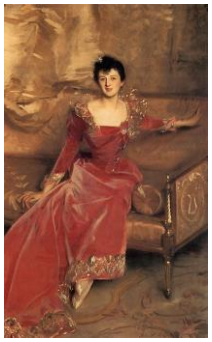
Arms of Senior-Milne

'I am the rose of Sharon, and the lily of the valleys.' - Song of Solomon 2:1

*Sir Robert Eden (d 1755) was the father of William Eden (1744-1814), **1st Lord Auckland** (father of George Eden (1784-1849), **1st Earl of Auckland** and **Governor-General of India**), Morton Frederick Eden (1752-1830), **1st Lord Henley of Chardstock**, Caroline, who married Most Rev. John Moore (1730-1805), **Archbishop of Canterbury**, great-great-great-grandfather of Sir Anthony Eden (1897-1977), **Prime Minister** and **1st Earl of Avon** and of Lt.-Col. Thomas Edward Lawrence (1888-1935), '**Lawrence of Arabia**'. Mariana Jones was the daughter of Arthur Jones of Reigate Priory and Sarah, daughter of William Webber of Mince Pie House, Blackheath. Mariana's sister, Sarah, married John Henry Vivian **MP** (d 1855), brother of **Lt-Gen** Richard Hussey Vivian (1775-1842), **1st Lord Vivian of Glynn**, who led the last cavalry charge at Waterloo, and was the mother of Sir Henry Hussey Vivian (1821-1894), **1st Lord Swansea**. Sir Robert Eden (d 1755) is/was also an ancestor of, inter alia, the **8th to 12th Dukes of Leeds**, the **7th to 9th Earls of Warwick**, the **6th and 7th Earls of Rosslyn**, the **16th Earl of Strathmore & Kinghorn**, the **9th and 10th Viscounts Chetwynd** and the **7th to 10th Earls of Guilford** (see www.genealogics.org).

Hugh Hammersley (1819-1882) and Dulcibella Eden (d 1903), of Warren House, Kingston-upon-Thames, were grandparents (through Margaret Hammersley (1861-1903)) of Sir D'Arcy Osborne (1884-1964), **12th Duke of Leeds, **Envoy Extraordinary and Minister Plenipotentiary to the Holy See**, who was involved with Pope Pius XII in an attempt to assassinate Hitler in 1940, grandparents (through Dora Hammersley (b 1862)) of Sir Ronald Campbell (1883-1953), **Ambassador to France** and then **Ambassador to Portugal** (father of Robin Campbell, Capt. **No. 8 Guards Commando**, who tried to assassinate General Rommel, and grandfather of Francis Ronald Egerton (b 1940), **7th Duke of Sutherland**), great-grandparents (through Maud Hammersley (1866-1951)) of Sir Andrew Duff-Gordon (b 1933), **8th Bt.**, and great-great-grandparents (through Mabel Hammersley (1864-1943), who married Walter Nassau Senior (1850-1933)), a direct male line descendant of Don Abraham Senior (1410-1493) of Castile, last known Exilarch of the Jews (King of Judah in exile), of Graham Nassau Gordon Senior-Milne (b 1955), **Nasi of the House of David**, **34th Prince Palatine and 41st Baron of Mordington**. See www.peerage.org/genealogy/pedigree.htm for further information.

'Not all the water in the rough rude sea
Can wash the balm off from an anointed king;'
Richard II, Act 2, Scene 2



'Mrs. Hugh Hammersley' (1863-1911) (Mary Frances Grant) by John Singer Sargent (Metropolitan Museum of Art, New York).

***Both Charlotte Rosa Baring and Rosa Frederica Baring were known as 'Rosa Baring'.

Charlotte Rosa was the inspiration for Tennyson's 'Maud', his favourite poem (he fell in love with her but was deemed too poor to marry her). At the time Rosa was living with her mother, Frances, and her step-father, Arthur Eden, at Harrington Hall, Spilsby, Lincolnshire, which is the garden referred to in 'Maud' and as 'the Eden where she dwelt' in 'The Gardener's Daughter'. The garden of Harrington Hall undoubtedly inspired Arthur's son, Frederick Eden, to create 'The Garden of Eden' in Venice with his wife Caroline Jekyll, sister of Gertrude Jekyll. So the garden which is the core of Tennyson's 'Maud' has an interesting connection, through 'The Garden of Eden' in Venice, t o England's greatest gardener, Gertrude Jekyll.

Rosa Frederica married, secondly, Col. George FitzGeorge (1843-1907), eldest son of Prince George, **2nd Duke of Cambridge** (1819-1904), grandson of George III. Their daughter, Mabel Iris FitzGeorge (1886-1976) married, secondly, **Prince Vladimir Galitzine** (1884-1954). Rosa Frederica was the mother of Vera Bate Lombardi (1883-1948), reputedly by Prince Adolphus (1868-1927), 2nd Duke of Teck and 1st Marquess of Cambridge (brother of Queen Mary, wife of George V). Vera was certainly brought u p as the *'surrogate child'* of Prince Adolphus and his wife, Margaret (see Vaughan, Hal, *'Sleeping with the Enemy - Coco Chanel's Secret War'*, Vintage Books, 2011, p.37 and p. 185, where he describes Vera as a *'member of the British royal family'*). Vera Bate Lombardi worked with Coco Chanel, introduced her to English high society (the Prince of Wales, the Duke of Westmins ter, Winston Churchill etc.) and inspired her to develop her signature 'English Look'. Vera was described as *'perfectly beautiful, full of sympathy and sweetness'* in Marie van Vorst's *'War Letters of an American Woman'* (John Lane, London, 1916, p. 69). Vera Nina Arkwright (Vera Bate Lombardi as she became) was described in the 1891 census (RG12/932 -69-9) as the **adopted** grand-daughter ('grand dau adopted') of her grand-parents, William and Elizabeth Baring, with whom she was living at the time at Norman Court, so she appears **not** to have been the legitimate daughter of Rosa Baring and Frank Arkwright, but the illegitimate daughter of Rosa and another man - on the basis that if she had been the legitimate child of her mother she would not have been described as 'adopted' in the census records. By her first marriage to Robert Balfour (in the Chapel Royal, St. James's Palace - meaning that she was considered to be a member of the Royal Family), Mabel Iris FitzGeorge had issue **General** Sir Robert (Victor) FitzGeorge-Balfour (1913-1994), **Coldstream Guards**, **Vice Chief of the Imperial General Staff** (1968), who commanded the Brigade of Guards from 1958-1960. Frank Arkwright was a descendant of Sir Richard Arkwright (1732-1792), inventor of the modern factory system and thus known as the 'Father of the Industrial Revolution'.

****Robert Duncombe Shafto of Whitworth MP (1806-1898) was the son of Robert Eden Duncombe Shafto of Whitworth MP (1776-1872) and Catherine Eden, daughter of Sir John Eden (1740-1812), 4th Bt., brother of Thomas Eden (d 1805) (see top left). Their father was Sir Robert Eden (d 1755), 3rd Bt., whose mother was Catherine Shafto (d 1730), daughter of Mark Shafto of Whitworth. Catherine Shafto was the aunt of 'Bonnie Bobbie Shafto' (Robert Shafto of Whitworth (c1732 -1797) of the famous song - *'Bobbie Shafto's bright and fair, Combing down his yellow hair, He's my ain for evermair, Hey for Bobbie Shafto.' ... 'Bobbie Shafto's gone to sea, Wi' silver buckles on his knee. When he comes back he'll Marry Me. Bonnie Bobbie Shafto.'* Robert Duncombe Shafto's (1806-1898) niece, Eleanor Margaret Duncombe Shafto (d 1913), who married Robert Charles de Grey Vyner (1842-1915), Capt. **Grenadier Guards**, of Newby Hall, Ripon, was an *'intimate friend'* of the Prince of Wales (later Edward VII) and the 2nd Duke of Cambridge *'fell a hopeless victim to her charms'* (St. Aubyn, 1963, p. 291), visiting the Vyner's chateau in France and joining them on a three month cruise of the Nile in 1889. The Vyner's daughter, Violet (d 1 945), became **Countess of Rosslyn**. The Shaftos were an ancient clan of Border Reivers from Shaftoe Crags, Northumberland.

One of 631 lines of descent (documented to date) from William the Conqueror to Thomas Eden:

William I 'The Conqueror', King of England (b. 14 Oct 1024 d. 13 Nov 1093) = Matilda of Flanders
Henry I 'Beauclerc', King of England (b. About 1068 d. 1 Dec 1135) = Matilda of Scotland (b. 1079 d. 1 May 1118)
Geoffrey V of Anjou (b. 24 Aug 1113 d. 7 Sep 1151) = Matilda of Germany (b. About 1104 d. 10 Sep 1167)
Henry II 'Fitzempress', King of England (b. 5 Mar 1133 d. 6 Jul 1189) = Eleanor of Aquitaine (b. About 1122 d. 26 Jun 1202)
John 'Lackland', King of England (b. 24 Dec 1167 d. 15 Oct 1216) = Isabella of Angouleme (b. About 1180 d. 31 May 1246)
Henry III, King of England (b. 10 Oct 1206 d. 16 Nov 1272) = Eleanor of Provence (b. 1217 d. 24 Jun 1291)
Edward I 'Longshanks', King of England (b. 17 Jun 1239 d. 7 Jul 1307) = Eleanor of Castile (b. 1240 d. 29 Nov 1290)
Edward II, King of England (b. 17 Jun 1284 d. 21 Sep 1327) = Isabella of France (b. 1292 d. 1358)
Edward III, King of England (b. 1312 d. 1377) = Philippa of Hainault (b. 1314 d. 1369)
John of Gaunt, Duke of Lancaster (b. 1340 d. 1399) = Catherine Roet (b. 1350 d. 10 May 1403)
Ralph Nevill, Earl of Westmorland (b. About 1364 d. 21 Oct 1425) = Joan Beaufort
Henry Percy, 2nd Earl of Northumberland (b. 3 Feb 1393 d. 23 May 1455) = Eleanor Nevill (d. 1463)
Henry Percy, 3rd Earl of Northumberland (b. 25 Jul 1421 d. 29 Mar 1461) = Eleanor Poynings
Sir William Gascoigne of Gawthorpe (d. 4 Mar 1487) = Margaret Percy
Sir Thomas Fairfax (d. 1520) = Anne Gascoigne (ancestors of Catherine 'Kate' Middleton)
Sir Nicholas Fairfax (d. 1570) = Jane Palmes of Lindley
Sir William Fairfax (d. 1 Nov 1597) = Jane Stapleton
Thomas Fairfax, Viscount Fairfax (b. 1574 d. 1636) = Catherine Constable (b. 1579 d. 1626)
Sir Thomas Laton of Laton and Saxehowe (b. 1597 d. 1651) = Mary Fairfax (d. 1636)
John Eden of Windlestone and West Auckland (b. 1616 d. 1675) = Catherine Laton (b. 1618 d. About 1686)
Sir Robert Eden (b. 1644 d. 17 May 1720) = Margaret Lambton (b. 1651 d. 22 Jul 1730)
Sir John Eden (b. About 1680 d. 2 May 1728) = Catherine Shafto (d. 2 Jul 1730)
Sir Robert Eden (b. About 1718 d. 25 Jun 1755) = Mary Davison of Beamish (d. 30 Jan 1794)
Thomas Eden (b. 1734 d. 1 May 1805)

Lt.-Col. T. E. Lawrence (1888-1935), 'Lawrence of Arabia', an Eden descendant (see above).

Anne Greenwood, wife of Thomas Hammersley (1747-1812), above, was also descended from William the Conqueror via the families of Farrar of Ewood and Kelke of Barnetby. An ne Greenwood was the daughter of Rev. Francis Greenwood (d 1761), son of Rev. William Greenwood (d 1727), son of James Greenwood (d 1712) by Frances Farrar, daughter of William Farrar of Ewood (d 1684), son of John Farrar of Ewood (b 1578), son of John Farrar of Ewood (d 1627/8) by Cecily Kelke, daughter of William Kelke of London, son of Roger Kelke of Barnetby by Elizabeth, daughter of Sir Martin de la See (1420-1494) by Elizabeth, daughter of Sir Philip Wentworth (1420-1464) by Mary de Clifford, daughter of John de Clifford, 7th Baron Clifford by Elizabeth Percy, daughter of Sir Henry Percy ('Hotspur') by Elizabeth Mortimer, daughter of Edmund Mortimer, 3rd Earl of Marc h, by Philippa Plantagenet, Countess of Ulster and of March (from whom the House of York derived their claim to the throne), daughter of Lionel of Antwerp, Duke of Clarence, son of Edwa rd III by Philippa of Hainault. See 'Lincolnshire Pedigrees' (London, 1903), p. 555, for a pedigree of the Kelke of Barnetby family. See http://www.peerage.org/genealogy/greenwood.htm fo r the Greenwood family. The Hammersleys, Greenwoods and Barings kept the royal family financially afloat on several occasions, at the cost of at least two bankruptcies to themse lves.

The Poulett-Thomson family were descended from the Poulett/Paulet family, branches of which family became Earls Poulett (extinct), Marquises of Winchester (premier marquessate) and Dukes of Bolton (extinct). Andrew Thomson, father of John Poulett -Thomson, was the father of John Julius Angerstein (1732-1823), almost certainly by Anna, Empress of Russia (1693-1740). Angerstein's art collection formed the basis of the National Gallery, London. Andrew's sister, Maria, married Sir Joshua Vann eck (1777-1844), **1st Lord Huntingfield**, of Heveningham Hall, Suffolk. The 5th Lord Huntingfield was **Governor of Victoria (Australia)** (1934-1939) and **Administrator (Acting Governor-General) of Australia** in 1938.

Interestingly, Princess Diana (1961-1997) was descended from an Alexander Milne of Fyfie, Aberdeenshire, so it is more than likely that she and her sons share a common descent from the Milnes of Aberdeenshire with the Milne family (see left), who are also from Aberdeenshire. Robin Grinnell -Milne (1925-2012), friend of Ian Fleming and the model for James Bond (007), was an Aberdeenshire Milne (https://en.wikipedia.org/wiki/Robin_de_La_Lanne -Mirrlees).

'The Baring marriage [Rosa Baring to George FitzGeorge] brought a whole raft of wonderful fillial connections that boast far greater retrospective impact [on] British culture than the mere style of an HRH or HH!' (posting to http://forum.alexanderpalace.org/index.php?topic=5733.30 dated 18/7/2007)